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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 365

SEAS SHIPPING COMPANY, INC., PETITIONER,

vs.

JOSEPH SIERACKI

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 23, 1945.

CERTIORARI GRANTED OCTOBER 8, 1945.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA

Relevant Docket Entries

Apr. 13, 1943. Complaint, filed.

Apr. 13, 1943. Summons, exit.

Apr. 13, 1943. Plaintiff's demand for jury trial, filed.

Apr. 23, 1943. Appearance of Krusen, Evans & Shaw, Esqs., for defendants, filed.

Apr. 28, 1943. Summons returned: "on Apr. 14, 1943 served" and filed.

July 28, 1943. Motion by defendant to bring in 3rd party defendant, filed.

July 28, 1943. Order of Court allowing motion to bring in 3rd party defendant, filed. 7/29/43 Noted & notice mailed.

July 28, 1943. Order of Court extending time for filing answer to Aug. 15, 1943, filed. 7/29/43 Noted.

July 28, 1943. Third-party complaint, filed.

July 28, 1943. Third-party Summons exit.

Aug. 10, 1943. Answer of defendants, filed.

Aug. 11, 1943. Third-party summons returned: "on July 31, 1943 served" and filed.

Aug. 17, 1943. Order of Court extending time for filing answer etc. of Third party defendant filed 8/18/43 Noted.

Aug. 19, 1943. Order to place case on the Trial List, filed.

Sept. 10, 1943. Order of Court extending time for filing answer etc. of Third party defendant, filed. 9/11/43 Noted.

[fol. 2] Sept. 28, 1943. Order of Court extending time for filing answer, etc. of Third party defendant and agreement of counsel thereon, filed 9/27/43 Noted.

Oct. 13, 1943. Answer to Third-party complaint, filed.

Nov. 1, 1943. Order of Court extending time for filing amended answer of third-party defendant to Nov. 22, 1943. 11/3/43 noted.

Mar. 27, 1944. In open Court: Case continued to #1 on May 1944, Jury Trial, list.

Mar. 31, 1944. Motion by Seas Shipping Co. Inc. to bring in 3rd party defendant and Order of Court granting leave

to make Bethlehem Steel Co. a party to this action filed. 4 1 44 Noted.

Mar. 31, 1944. Third-party Complaint against Bethlehem Steel Co., filed.

Apr. 5, 1944. Motion to amend complaint.

Apr. 5, 1944. Hearing sur motion to amend complaint.

Apr. 5, 1944. Order of Court amending complaint, filed 4 6/44 Noted.

Apr. 5, 1944. Amended Complaint, filed.

Apr. 13, 1944. Motion by Bethlehem Steel Co. for leave to take deposition before issue joined and Notice of motion filed.

Apr. 20, 1944. Third-party Summons returned: "on Apr. 1, 1944 served Bethlehem Steel Co." and filed.

Apr. 20, 1944. Answer of Bethlehem Sparrow's Point Shipyard, Inc. to amended complaint, filed.

Apr. 20, 1944. Answer of Bethlehem Steel Co. to Third-party complaint, filed.

[fol. 3] Apr. 20, 1944. Answer of Bethlehem Steel Co. to amended complaint, filed.

May 1, 1944. Jury called and sworn.

May 1, 1944. Trial—witnesses sworn.

May 2, 1944. Trial resumed.

May 3, 1944. Trial resumed.

May 5, 1944. Jury withdrawn and case submitted to the Court—witnesses sworn.

May 5, 1944. Trial concluded. C. A. V.

July 13, 1944. Opinion, Kirkpatrick, J., granting judgment for plaintiff in $9500. against third party defendants, filed.

July 13, 1944. Judgment in favor of plaintiff in $9500. and against Bethlehem Steel Co. and Bethlehem Sparrow's Point Shipyard Inc. and in favor of Seas Shipping Co. Inc. and against plaintiff, filed. 7/14/44 Noted & notice mailed.

July 21, 1944. Notice of Appeal by Third-party defendants, filed. 7/21/44 Copy mailed to Freedman & Goldstein & Krusen, Evans & Shaw.

July 21, 1944. Copy of Clerk's notice to U. S. Circuit Court of Appeals, filed.

July 25, 1944. Supersedeas bond on appeal in $12,000 with Travelers Indemnity Co. surety and order of Court approving bond filed. 7/26/44 Noted & Notice mailed.

Aug. 10, 1944. Order of Court making supplemental findings of fact and conclusions of law and dismissing action as to Robin Line filed. 8/11/44 Noted & Notice mailed.

[fol. 4] Aug. 15, 1944. Notice of Appeal by plaintiff filed. 8/16/44 copies to Krusen, Evans & Shaw and P. H. Strubing.

Aug. 15, 1944. Copy of Clerk's notice to U. S. Circuit Court of Appeals filed.

Aug. 21, 1944. Motion for extension of time for perfecting record on appeal and Order of Court extending time to Sept. 25, 1944, filed. 8/22/44 Noted and notice mailed.

Sept. 12, 1944. Deposition of Earl J. Bonn filed.

Sept. 12, 1944. Stenographer's transcript of pre-trial hearing on April 22, 1944, filed.

Sept. 12, 1944. Testimony, filed. (4 vol.)

Sept. 12, 1944. Stipulation of Counsel as to record on appeal filed.

Sept. 13, 1944. Plaintiff's requests for findings of fact and conclusions of law filed.

Sept. 13, 1944. Defendants' requests for findings of fact and conclusions of law, filed.

Sept. 13, 1944. Third-party defendant's requests for findings of fact and conclusions of law filed.

[fol. 5] In United States District Court

Excerpts from Testimony

Offers in Evidence

Mr. Freedman: I am going to offer now some of these pleadings, and as I suggested before, Mr. Strubing, if there is anything inconsistent between the two answers, will you please call it to my attention as we go along, and then when we get more time I will go over your amended answer a little more carefully.

Is there any dispute about the operation of the vessel?

Mr. Evans: Our answer admits ownership but denies operation. It does not affect our legal position at all. We are not making any point of that as attempting to escape liability if we are liable otherwise.

Mr. Freedman: All right, sir.

I offer in evidence Article 2 of the Plaintiff's complaint, which is admitted in the answer. Shall I read them, sir, or just refer to them?

The Court: No, no, you don't need to read them.

(Article 2 of the Plaintiff's complaint reads as follows:)

"(2) Defendant, Seas Shipping Co., Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of New York."

Mr. Freedman: I offer in evidence so much of Article 4 of the answer which reads as follows:

"* * * Seas Shipping Company, Inc., admits ownership of the steamship Robin Sherwood."

I offer in evidence so much of Article 9 of the answer —when I have used the word "answer" thus far, I have referred to the answer of the Seas Shipping Company. I offer in evidence so much of Article 9 of the answer of Seas Shipping Company which reads as follows:

"Any injury which the complainant may have sustained on board the Steamship 'Robin Sherwood' was [fol. 6] sustained through the instrumentality of shackles, cables, booms, gear and equipment furnished to defendant, Seas Shipping Company, Inc., by Bethlehem Sparrow's Point Shipyard, Inc."

Mr. Strubing: That, of course, is not admitted by this defendant, sir.

The Court: Yes, surely. Whatever admissions are in the pleadings are binding only on the party that admitted them.

Mr. Freedman: I offer in evidence so much of Article 6 of the Third-Party Complaint by the Seas Shipping Company against the Bethlehem Steel Company which reads as follows:

"Bethlehem Steel Company constructed or caused to be constructed the vessel known as Hull No. 4350 and on or about July 16th, 1941 it was sold and delivered to the United States Maritime Commission. On the same date it was delivered by the United States Maritime Commission to Seas Shipping Company, Inc.. * * *"

Mr. Strubing: If Your Honor please, I think there is a denial of part of that, and I just would like to check. We have denied that, Your Honor.

Mr. Freedman: This would not be any admission against you anyway.

Mr. Strubing: If it is only being offered against Sea Shipping, that is all right.

Mr. Freedman: I couldn't, as a matter of fact, offer it against anybody but Seas Shipping, because it is an admission only against Seas Shipping.

The Court: Unless Bethlehem admitted it in their answer.

Mr. Strubing: We didn't.

[fol. 7] The Court: Number 6. Admitted, you say? You admit that.

Mr. Freedman: I think Mr. Strubing is right about that, Your Honor. There are two sets of answers, one by Bethlehem Sparrow's and the other by Bethlehem Steel.

The Court: Bethlehem Steel admits it.

Mr. Freedman: One of them, I think, does not.

The Court: Well, Sparrow's say they don't know. Bethlehem Steel admits it.

Mr. Strubing: That is right, Your Honor; I am sorry. I had the wrong answer.

The Court: Which one admits it?

Mr. Strubing: Bethlehem Steel.

The Court: It is admitted, then, by everybody that Bethlehem Steel Company constructed the vessel and that on July 16, it was sold and delivered to the United States Maritime Commission, and on the same date it was delivered by the United States Maritime Commission to the Seas Shipping Company.

Mr. Strubing: That is not quite correct, Your Honor. We admitted that they constructed it or caused it to be constructed.

The Court: Well, now you just say "Admitted". Oh, I see; I didn't read it correctly. "Or caused to be constructed." All right.

Mr. Freedman: I offer so much of Article 10 of the Third-Party Complaint against the Bethlehem Steel Company—that is, it is the complaint of the Seas Shipping Company against the Bethlehem Steel Company—which reads as follows:

> "At the time of the delivery of the said Hull No. 4350 to the United States Maritime Commission, the shackle which shackles the topping lift at the boom end of the jumbo boom at No. 5 Hatch was defective * * *"

[fol. 8] The Court: Seas Shipping admits it.

Mr. Evans: If Your Honor please, we will have to take the whole averment of paragraph 10.

Mr. Freedman: That is not a qualified statement, Your Honor.

The Court: Well, that is all right. That is all that is admitted.

Mr. Evans: Well, we go on to speak of the nature of the defect.

The Court: That comes in later. You admitted it was defective, that is all, and he has not shown the nature of the defect yet.

Mr. Strubing: Again may I note that is only being offered against Seas Shipping?

The Court: Yes.

Mr. Freedman: I offer in evidence so much of Article 11 of the Third-Party Complaint by the Seas Shipping Company against the Bethlehem Steel Company which reads as follows:

"The Third-Party Defendant, Bethlehem Steel Company, breached its duty in the following respects:

"(a) Bethlehem Steel Company furnished, or caused to be furnished, to Seas Shipping Company, Inc., through the United States Maritime Commission"—

The Court: I don't think you need read it. That is an admission against the Seas Shipping Company only.

Mr. Freedman: Yes, sir.

The Court: Both the Bethlehem companies deny that.

Mr. Freedman: That is only 11 (a), Your Honor. That is why I wanted to read it, because there are other allegations that are not being offered.

The Court: All right.

[fol. 9] Mr. Freedman: That is just 11 (a). Shall I read it or just shall I refer to it?

The Court: Well, you don't need to read it.

Mr. Freedman: All right, sir.

I offer in evidence 11 (c) of the same Third-Party Complaint. I offer in evidence Article 11 (d) of the same complaint. Does Your Honor think I better read these? There aren't many, only two or three.

The Court: All right, go ahead.

Mr. Freedman: So I won't be mixed up in them.

The Court: All right, 11 (a) is what?
Mr. Freedman: I have already read 11 (a), have I not?
The Court: No, I think not.
Mr. Freedman: Shall I read that over?
The Court: Read the whole thing.
Mr. Freedman: 11 (a) says:

"Bethlehem Steel Company furnished, or caused to be furnished, to Seas Shipping Company, Inc., through the United States Maritime Commission, a defective shackle."

"(c) Bethlehem Steel Company furnished, or caused to be furnished, to Seas Shipping Company, Inc., through the United States Maritime Commission, a shackle which was not of merchantable quality."

"(d) Bethlehem Steel Company furnished, or caused to be furnished, to Seas Shipping Company, Inc., through the United States Maritime Commission, shackles, gear and equipment which was unfit for the purpose intended, the intended purpose or use being known to Bethlehem Steel Company."

Mr. Strubing: Those three are also offered only against Seas Shipping.
[fol. 10] The Court: Yes.
Mr. Freedman: That is right.
The Court: I wonder if you would tell us, Mr. Strubing, the relationship of Bethlehem Steel and Bethlehem Sparrow's Point.
Mr. Strubing: Yes, sir. They are corporations all of whose stock, as I understand it, is owned by another corporation.
The Court: They are both subsidiaries of another corporation?
Mr. Strubing: That is my understanding.
The Court: Which is the corporation that built this ship?
Mr. Strubing: One built part and the other built part, Your Honor.
The Court: They both did work in constructing this particular ship?
Mr. Strubing: Yes, sir.
The Court: Which one turned it over to the Maritime Commission?

Mr. Strubing: Bethlehem Steel.

The Court: Bethlehem Steel Company?

Mr. Strubing: Yes, sir.

Mr. Freedman: I believe the original contract was with the Bethlehem Steel Company, was it not?

Mr. Strubing: That is correct.

The Court: The original contract for the construction of the ship?

Mr. Strubing: Yes, sir.

The Court: That was between the Maritime Commission and the Bethlehem Steel Company?

Mr. Strubing: Yes, sir.

[fol. 11] Mr. Freedman: Then it would seem as though the Bethlehem Steel and Bethlehem Sparrow's had a contract between them.

The Court: That is right. I assume that their relationships were as a result of the contract.

Mr. Strubing: Yes, sir.

The Court: As to which did what on the ship.

Mr. Strubing: That is correct, Your Honor.

Mr. Freedman: I offer in evidence Article 9 of the answer of Bethlehem Sparrow's Point Shipyard to the amended complaint, which reads as follows:

> "It is admitted that the vessel was constructed partly by Bethlehem Steel Company and partly by this third-party defendant."

I offer in evidence so much of article 10 of the same answer which reads as follows:

> "* * * It is admitted that booms and tackle for the S. S. 'Robin Sherwood' were installed upon the vessel by this third-party defendant in the course of the construction of the vessel."

Now, here, if the Court please, Article 10 of the amended complaint shows:

> "Upon information and belief the defective tackle and boom were furnished to the S. S. 'Robin Sherwood' by the Bethlehem Steel Company and/or the Bethlehem Sparrows Point Shipyard, Inc. in the course of the construction of the said vessel."

We have used the word here "furnished," and there is no denial of that allegation of that word "furnished" in

this particular clause, and I therefore offer in evidence the fact that it was furnished as well as installed.

Mr. Strubing: I object to that, Your Honor, on the ground that we have admitted that it was installed, which [fol. 12] is a word that has some legal significance. I don't know what the word "furnished" means.

The Court: Which clause are you referring to?

Mr. Freedman: Number 10. It does not deny that it was furnished.

The Court: Number 10?

Mr. Freedman: Of the answer of Bethlehem Steel to the amended complaint, Your Honor.

The Court: To the Third-Party Complaint?

Mr. Freedman: No, sir, to the amended complaint of the plaintiff.

The Court: To the original complaint?

Mr. Freedman: To the amended complaint, Your Honor. It is the original answer.

The Court: I don't think he adopts your language. He admits they were installed.

Mr. Freedman: And I say they were furnished. It will become apparent, Your Honor, later on why I make it. We say he furnished.

The Court: I think he does not intend to admit it in the terms of your language. He says he admits they were installed and that is all he admits.

Mr. Freedman: But we say they were furnished, and if he doesn't deny it, isn't it admitted Your Honor?

Mr. Strubing: I would like to know what he means by "furnished."

Mr. Freedman: Furnished to the vessel and installed on the vessel are two different things. Furnished to the vessel means they procured it and furnished it aboard. They might or might not have installed it.

The Court: They admit they installed it. That is what they admit. I don't see how they could install it without furnishing it.

[fol. 13] Mr. Freedman: Someone else may have furnished it.

The Court: If you install something, you certainly furnish it. Somebody else may also furnish it first, but when you install a thing, you certainly furnish it. That ought to satisfy you, oughtn't it?

Mr. Freedman: I should think so.

The Court: I do not think there is any doubt of that. We will see when we come to whatever you have in mind.

Mr. Freedman: What I had in mind, sir, was that Bethlehem Sparrows didn't have any contract to build it, with the Maritime Commission, but they went aboard and they probably found the equipment there, and I put that allegation in there so as to show which one furnished it, because there is a liability on the furnisher as well as the one who installed it. Under certain circumstances it might be a little different. That is why I put it in.

The Court: At the present time I will consider that only as an admission that it was installed, and if he wants to amend by denying that he furnished it, I will permit him to do so now.

Mr. Strubing: I desire so to amend.

The Court: All right, I will permit it.

Mr. Strubing: This is Bethlehem Sparrows Point.

The Court: Does it make any difference?

Mr. Strubing: I don't think it does.

The Court: I will permit you to put the admission in your own language rather than in the language of the statement.

Mr. Freedman: I wasn't trying to take advantage of the language. One of them furnished it and the other installed it.

The Court: He says that when he admits installing, he does not admit furnishing. The answer will be considered as being so made.

[fol. 14] Mr. Freedman: I offer in evidence Article 12 of the same answer, which reads as follows:

> "* * * It is admitted that the tackle and booms installed upon the vessel by this third-party defendant were installed with knowledge that said tackle and booms would be used by stevedores for the purpose of loading and unloading said vessel."

I offer in evidence Article 9 of the answer of the Bethlehem Steel Company to the amended complaint in its entirety. Under those circumstances I don't think I need read it, your Honor. That goes also to the construction of the vessel.

(Article 9 of the answer of the Bethlehem Steel Company to the amended complaint reads as follows:)

"It is admitted that the vessel was constructed partly by this third-party defendant and partly by Bethlehem Sparrows' Point Shipyard, Inc."

I offer in evidence so much of Article 10 of the same answer which reads:

"* * * It is admitted that tackle and booms were installed upon the vessel by Bethlehem Sparrows Point Shipyard, Inc. in the course of the construction of the vessel."

The Court: Is that the whole thing?

Mr. Freedman: That is the works, sir.

The Court: Well, I don't think you need to call a witness this morning. It is a quarter after twelve.

Mr. Freedman: There may be some slight changes—I don't think there will be—in view of the amended answers, but I don't think it will affect the substance, Your Honor.

The Court: I have a matter that I have to hear in chambers at two o'clock. I think it will take about fifteen minutes, so we will recess today until a quarter after two. The [fol. 15] regular time is two o'clock, but today you need not be back until two-fifteen.

(Recess taken at 12:15 P. M. until 2:15 P. M.)

After Recess

The Court: Will you proceed, gentlemen, please?

Mr. Freedman: If the Court please, there is only one more offer that I wanted to make from the amended pleadings that have been filed. I think this settles the controversy that we had before.

I offer in evidence Article 11 of the amended answer of Bethlehem Sparrows Point to the amended complaint, that part of Paragraph 11 which reads as follows:

"* * * It is admitted that booms and tackle for the S. S. 'Robin Sherwood' were assembled and affixed to the vessel by Bethlehem Sparrow's Point Shipyard, Inc. in the course of the construction of the vessel."

Mr. Sieracki.

PLAINTIFF'S EVIDENCE

JOSEPH SIERACKI, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Freedman:

Q. How old are you, Mr. Sieracki?
A. Fifty-three.
Q. What kind of work do you do?
A. Longshoreman.
Q. Where do you live?
A. 2850 Gillingham Street, Philadelphia.
Q. Are you married?
A. Yes.
Q. Where were you born, Mr. Sieracki?
A. Poland.
[fol. 16] Q. When did you come to this country?
A. 1911.
Q. Since 1911, what kind of work have you done?
A. I was working in Cramps Shipyard for a couple of weeks and then I worked Moroccan shop.
Q. Is that a leather shop?
A. Yes, sir. For five or six years, and since that I have gone to longshore.
Q. Since then you have been working as a longshoreman?
A. Yes.
Q. Have you been working pretty steadily?
A. Pretty steadily.
Q. Whom were you working for on December 23, 1942?
A. Atlantic and Gulf Company, stevedore.
Q. Atlantic and Gulf Stevedores. Here in Philadelphia?
A. Yes.
Q. What kind of work were you doing for the Atlantic and Gulf?
A. Winch operator.
Q. Was that in the longshoremen's gang?
A. Yes.
Q. Will you tell us what happened on the 23rd of December, 1942. Start at the beginning and tell us in your own words what happened.

The Court: Pardon me. Have you any pictures or drawings or anything that will indicate how this thing looks?

Mr. Freedman: We don't have them, sir. It is pretty difficult to take pictures today. If you approach the waterfront today, they will shoot you if you have a camera with you.

Mr. Strubing: May I see Your Honor at side bar for just a moment?

The Court: Yes.

[fol 17] (Discussion at side bar.)

The Court: The parties have submitted here a photograph of this piece of equipment, which is not a photograph of the original, but it is a picture of a model that was made to scale so that it gives you an idea of what we are talking about when we talk about shackles and booms and that sort of thing. You will see it as soon as the thing develops.

I think maybe you might let the jury see it.

Mr. Freedman: I was just going to develop it with a few questions, sir.

The Court: All right.

By Mr. Freedman:

Q. What kind of work do you do, Mr. Sieracki, as a longshoreman? Will you explain briefly, please.

The Court: He said he was a winch operator.

By Mr. Freedman:

Q. What kind of work did you do on board the ship?

A. 1943? 1942?

Q. Let us go back. ~~I think perhaps~~ if we develop just this particular day it will come out and we will save some time on it. Tell us what you did from the time you first went to work on December 23, 1942, and thereafter what happened.

A. The first thing when we went in there we took the hatches off.

Q. You say you went in there. Where did you first go to work? Did you go first to the ship or did you go somewhere else first?

A. To the ship.

Q. Didn't you have to meet at an office somewhere for the Atlantic and Gulf?

A. We got to go in Pier 48. They put us on a truck and take us down 98.

Q. You were employed for the Atlantic and Gulf and you had to report at what pier?

[fol. 18] A. 48.

Q. And they took you in a truck to the ship which was located where?

A. Pier 98.

Q. Is that South Wharves here in Philadelphia?

(No answer.)

Mr. Freedman: Pier 98 South Wharves. I think it is admitted in the answer.

By Mr. Freedman:

Q. What is the first thing you did when you got to the ship—you and the other men?

A. The first thing when we go up on the ship, put the wires on the winch and take the hatches off first. When we take the hatches off, we swing the light booms on the side and get ready on the king boom.

Q. Did you help on that?

A. Yes, we all worked together.

Q. The king boom was which boom?

A. The one in the middle.

Mr. Freedman: If it is all right with Your Honor, I would like to lead him just a little bit on this.

The Court: It is all right with this witness.

By Mr. Freedman:

Q. Mr. Sieracki, is it true that there is a mast right in the center and a winch on either side?

A. There is three winches there. The mast is supposed to be right in the center. One winch straight the mast, and one winch on the side, the other one on the side. There was three winches.

Q. Around this mast there is what they call a table; is that correct?

A. Yes.

Q. From this table they have the booms sticking out; is that right? The booms stick out from the mast over the table?

[fol. 19] A. That is right.

Q. Would this be a picture of one of the booms which sticks out from the mast?

A. It looks like the one, but I didn't see any mast over there.

Q. The mast doesn't show on this picture, but this is just the end of the boom. Now, does this picture also show, generally speaking, without confining ourselves to this case, the block and the shackle that holds the block to the end of the boom? Just up here, forgetting what is down here — it might not have been the same thing there at the time — but just up here there is a shackle and a block which is attached to the shackle. Is that generally the kind of equipment that you use?

(No answer.)

Mr. Freedman: I think perhaps, sir, there are a number of other witnesses in court ——

The Court: You all agree that it is? What is the use of going any further with him? It is agreed that that is a correct picture of the equipment, so far as it covers it.

Mr. Freedman: May I show it to the jury, sir?

The Court: Yes, I want to look at it myself for a moment. Which is the shackle here?

Mr. Freedman: This is the block and this is the shackle. This is the end of the boom right here, and this is also a shackle on this block.

The Court: All right, you show them, so we will know what the words mean.

Mr. Freedman (Addressing the jury): Coming out from the mast you see these sticking up. You have this large mast in the center, and extending out from this mast are a number of booms, and this is one of them, and at the top of this boom you see a number of blocks which are sus- [fol. 20] pended, and these blocks are held fast to the end of the boom by so-called shackles. This is a shackle right here that holds it.

The Court: It is a sort of ring; the shackle?

Mr. Freedman: A U-shaped sort of thing. Here is the shackle that holds the block to this. These lines go down, and another block down here, and a hook attached to this, and the cargo or whatever it is that has to be lifted would be attached to the hook right here.

Juror No. 9: That goes right down to the mast?

Mr. Freedman: This post right here goes down to the mast.

Juror No. 9: I mean this.

Mr. Freedman: This goes also to the mast. The mast would be right over here, and these lines would go right to the mast, and this boom right here would extend eventually down to the mast, lower down.

I will leave this right here.

The Court: Let me see it again if you will, please.

Mr. Freedman: Surely (Handing to the Court).

By Mr. Freedman:

Q. Mr. Sieracki, on that day will you tell us what happened? You said, I believe, that you started to take the hatch covers off and rig your gear. Was it to load or unload?

A. To load.

Q. Do you know what they were going to load?

A. Parts of boxcar.

Q. Parts of boxcars.

Mr. Freedman: We have already agreed to certain weights of the boxcars. At this point, sir, I think it might be appropriate for me, in lieu of introducing the cargo manifest itself, which might contain some confidential [fol. 21] information, can we agree that the boxcars, the parts which were being hauled, were not in excess of 8.2 tons and that the boom itself was designed to carry 10 tons?

Mr. Evans: The boom was designed to carry 10 tons. We agree to that, and these boxcars weighed 8.2, I believe.

The Court: That is, the parts of the boxcars.

Mr. Evans: It was the flat car that they were lifting.

Mr. Freedman: Is that agreed all around, Mr. Strubing?

Mr. Strubing: That is the first I have heard of the weight of the cars. I will agree that the 10-ton boom was designed to carry 10 tons in weight, but I would like to check the weight of the cars with Mr. Evans.

The Court: You check with Mr. Evans, and if you don't object to the statement made, I will take it as part of the evidence.

Mr. Strubing: Very well, Your Honor.

Mr. Freedman: That will eliminate a lot of evidence, Your Honor.

The Court: All right, he can check it, and if you have any objection, you make it. Go ahead.

Mr. Strubing: I guess we can reserve that till later.

The Court: If you do not object by tomorrow morning, I will assume that it is satisfactory.

By Mr. Freedman:

Q. Mr. Sieracki, your job on that day was to operate one of the winches?

A. Yes.

[fol. 22] Q. And you said that there were how many other winches?

A. I didn't get it.

Q. There were two other winches?

The Court: Yes.

By Mr. Freedman:

Q. At this time there were two other winches in operation. You were running one, and who was running the other one?

A. Stanley Skladzen.

Q. Will you tell us exactly what you were required to do with your winch and what he was supposed to do with his winch?

A. I had a topping lift on my winch.

Q. That is the boom——

A. That is the boom going up and down.

Q. Your winch, in other words; controlled the swinging of the boom away from the mast or toward the mast; is that right?

A. That is right.

Q. And in that way you could control the movement of the cargo? You could take it further away or bring it back?

A. Or bring it back, yes.

Q. Merely by swinging the boom closer to the mast or away from the mast; is that right?

A. That is right.

Q. Skladzen's job was, once you got the boom in position where the cargo could be lowered, his job was to either lower the cargo or raise it; is that right?

A. That is right.

Q. That is what his winch did?

A. That is what his winch did.

Q. On this particular morning you tell us what happened. Had you started to move any cargo yet?

A. We swung these little booms on the side and we got [fol. 23] that king boom ready so we could go outside and get one piece.

Q. When you say "one piece" you mean one part of the freight car?

A. One part of the freight car, and set them down in the hold, place them on the place, and come out and get another piece. Now, we get another piece, send another piece down the hold.

Q. When you say "piece," of course you mean another part of a freight car.

A. Another part of a freight car.

Q. Will you explain to the jury, Mr. Sieracki, how that part of the freight car was lowered down into the hold? Was it lowered straight down?

A. No, it was lowered down like on the edge.

Q. You mean on a slant?

A. On a slant.

Q. Why did it have to be lowered down on a slant?

A. Because it was too long.

Q. Part of the freight car was too long for the hold, so they put it on a slant and lowered it that way?

A. Yes.

Q. What did they do when it got down in the hold?

A. Laid it down flat and hooked the four corners and pick it up straight.

Q. After they got it down in the hold they laid it flat, then they put the hooks in position so that they could pick it up evenly?

A. Even up.

Q. Then what did they do after they got it in that position?

A. After they got it in that position, Skladzen tried to take a strain on it.

Q. Ordinarily you lay it down even and pick it up even so you can stow it in another part of the hold?

A. That is right.

[fol. 24] Q. On this particular occasion you got the second part of the freight car over the hold and then Skladzen lowered it down to the bottom?

A. Yes.

Q. What were you doing when it was down on the bottom?

A. I shut my winch off. I was just looking down on the hold.

Q. Was that because, so far as you were concerned, you had nothing to do till he got down?

A. Till he got down.

Q. Then you started again?

A. Then I started again.

Q. At the time the second part of the freight car was down in the lower hold you were not doing anything except looking down in the hold alongside of your winch?

A. That is right.

Q. Was your winch alongside the edge of the hold?

A. Right alongside.

Q. You tell us what happened from that point on, please.

A. When I was looking down the hold and Skladzen was taking a strain on it, he just took a strain on it and I see the wires shake a little.

Q. When you say "wires"——

A. The cable.

Q. Would you mean these wires right here extending down from this block?

A. That is the one. I saw it started shaking.

Q. When you say "take a strain" you mean it tightened up?

A. That is right, take a strain on it.

Mr. Freedman (Addressing the jury): The cargo would be down here. Here is where the work would be.

By Mr. Freedman:

Q. The first thing you saw was the wire started to shake. Then what happened?

[fol. 25] A. Then I got hit with something on my back. When I got hit on my back, I got everything blind on my eyes. It was everything black.

Q. How many times did you get hit?

A. Then I felt another hit, and I didn't know about it till I got my hand out.

Q. What is the next thing that you knew?

A. I knew when I come to I was laying underneath the boom. My hand was on top of the winch and the boom laying on top of my hand.

Q. Was the boom lying over your body?

A. Right over my body.

Q. To illustrate, put your hand on there, please. This would be the winch (indicating).

A. Yes.

Q. You mean that the boom was lying on your hand and across your body this way?

A. When I was down I didn't know nothing what happened.

Q. Is that the way it was lying?

A. Yes, that is the way. When I tried to get up when I come to, I couldn't do anything.

Q. You couldn't do anything when you came to. How did they get you out of there?

A. I don't know. I don't remember how they got me out of there.

Q. Did they get your hand out from underneath the boom?

A. Yes, they got it out.

Q. Where did they take you after that, if you know?

A. I don't remember where they took me.

Q. Did you go to the hospital?

A. I know I find myself at the hospital.

Q. What parts of your body were hurt?

A. Right over on my back.

Q. How about your hand?

A. The hands right there.

[fol. 26] Q. Was your head cut?

A. Yes.

Q. How long did you remain in the hospital?

A. Two weeks.

Q. Were you in pain in the hospital?

A. Yes.

Q. What did they do for you there?

A. I don't remember what they done to me the first couple of days.

* * * * * * *

J. SIERACKI.

Cross-examination.

* * * * * * *

Q. When you came aboard the vessel that morning, you and your men rigged the gear the first thing, didn't you?

A. Yes.

Q. Then you put the booms in the position that you wanted them, didn't you?

A. That is right.

Q. Then you swung the boom out over the pier and picked up one of these flat cars?

A. Yes.

Q. You swung that back over the vessel and down into the hold? There was no trouble with that first operation, was there?

A. No, I didn't have no trouble at all.

Q. Then you swung your boom over to the pier again and you picked up the second flat car?

A. That is right.

Q. And you swung that back over the hold?

A. Yes.

Q. And everything worked all right up till that point, didn't it?

A. Yes, up till that point.

Q. And you had this second flat car lowered down into the hold and had taken the cables off that flat car and re-hooked them to move the car in the hold, didn't you?

[fol. 27] A. I don't understand that.

By the Court:

Q. He is asking you, after you put the second car, the second piece, down in the hold, did you then change the cables on it so that they could move it on the hold?

A. That is right.

Q. Did you help do that?

A. No, I was looking down the hold.

Q. But the other fellows did it?

A. The other fellows did it.

Q. They hooked it up to the new points; is that correct?

A. That is right.

Q. They had to lift it again to move it over in the hold; is that right?

A. They got to lift them up and put it on top of the other piece.

Q. They made that change so it would be level when you lifted it?

A. That is right.

By Mr. Evans:

Q. The lift that you were about to make or started to make to move the flat car down in the hold, that was made by the other winchman, Stanley?

A. Yes.

Q. And he started to operate his winch and that put the strain on the cables, didn't it?

A. That is right.

Q. And they suddenly came loose and this accident happened?

A. Come down.

. . . . . .

By Mr. Evans:

Q. Now, Mr. Sieracki, when you came aboard the vessel that morning to start to work, this boom that you operated up and down with your winch was up in an upright position against the mast, wasn't it?

[fol.28] A. Yes, that is where it was.

Q. And it was fastened there so it wouldn't fall down?

A. Yes.

Q. So the first thing you stevedores did was to unfasten that and move the boom down?

A. No, we didn't unfasten that.

Q. What did you do?

A. We didn't do nothing. Who done that, I don't know. We don't unfasten that.

Q. I don't mean you unfastened anything, but the boom was in an upright position, wasn't it?

A. Right in position straight up to the mast.

Q. You already testified that your stevedore gang came aboard and rigged?

A. Yes.

Q. By "rigged" what do you mean? Don't you mean that you unfastened that boom so that it would come down?

A. No, we didn't do that; we just put wires on the winches.

Q. Put the wires on the winches?

A. Yes, and shift the booms around.

Q. And shift the booms around?

A. Them little booms, put them on the side, and when we get the wires ready, we was waiting for somebody to come up and tie this.

Q. Your gang of stevedores were in charge of their own foreman, were they not? You had a stevedore foreman, didn't you?

A. Yes.

Q. And he was in charge of your crew?

A. Yes.

Q. And you worked under his directions; is that right?

A. Yes, what he told me, I got to do that.

Q. Would you remember what the foreman's name was?

A. No, I don't remember.

Q. Was his name Calberry?

[fol. 29] A. He supposed to be one.

Q. He was the foreman, wasn't he?

A. Yes.

Q. Didn't you testify at this hearing that Mr. Strubing was talking about that Calberry was the stevedoring foreman?

A. Yes, that is what he was supposed to be.

Q. And he was in charge of the group that you were working with?

A. Yes.

Mr. Evans: That is all.

Redirect examination.

By Mr. Freedman:

Q. How high up above the winches were the tops of the booms, Mr. Sieracki?

A. What do you mean? Platform?

By the Court:

Q. How far above your head was the top of the boom? How high above your head?

By Mr. Freedman:

Q. How high was it, say, when this is in position up top? How high is it? How high is it from here down to the deck (indicating)?

A. The way we had them it was about 40 foot.

Q. When you are rigging the gear, does it have anything to do with the gear up here (indicating)?

A. No.

Q. When you say you only attached the wires, does that mean to the winches?

A. To the winches.

Q. And the winches are on deck?

A. Yes.

. . . . . .

[fol. 30] S. SKLADZEN.

Direct examination:

. . . . . .

A. Well, we got hired to quarter to eight, at Pier 48, Delaware Avenue, and we got on the truck and went to Pier 98, Delaware Avenue and Oregon. At eight o'clock we started to work.

Q. You first rigged the gear?

A. Yes, sir.

Q. You didn't have anything to do with any of the gear up top, did you?

A. No, sir, we get the crew to take care of that.

. . . . . .

Q. What happened after that?

A. Well, we got a four by four plank and we got it between the winch and the king boom and we hoisted the king boom up a little and we pulled his hand out.

Q. How many men did it take to do that?

A. Say about six of us, maybe more. I didn't count the men. It was quite a few of us.

Q. And you got Joe out?

A. That is right.

Q. Is that the way you released his hand from underneath?

A. That is right.

Q. And then was he taken off the ship then?

A. Yes.

Q. In an ambulance, was he taken away?

A. No, took him out to the end of the pier, that is where we set until the patrol wagon came after him.

Q. And took him to the hospital?

A. That is right.

Q. You don't know what happened after that?

A. No, sir.

Q. Were you looking down in the hold at the time?
A. I was.
Q. Were you able to see the part——
[fol. 31] A. That is right.
Q. ——of the freight car?
A. That is right.

. . . . . .

FRED B. MONEY, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Freedman:

Q. How old are you, Mr. Money?
A. Fifty-nine years old.
Q. What is your occupation?
A. I am Superintendent of the Forge Shop, the Bait Chain, Anchor, and Forge Shop.
Q. Do you have any engineering degrees, Mr. Money?
A. Yes, I have three.
Q. From what schools and what are they, please?
A. Ohio State College of Engineering, Bachelor of Civil Engineering, Structural Engineer, Mechanical Engineer.
Q. Will you state what experience you have had, Mr. Money, along mechanical and civil engineering lines and structural?
A. Yes. After coming out of engineering school I entered a shop as an apprentice; became Chief Inspector of the Illinois Steel Company in Chicago; became General Foreman of the Lackawanna Bridge Company, Buffalo, New York. From there to the shop superintendency of the Mirabo Construction Company in Chicago. I was then General Foreman of the American Bridge Company at Gary, Indiana. For thirteen years I was Superintendent of the shops of the Pensacola Shipbuilding Company, which included a large forge shop, some fifty or sixty blacksmiths. For thirteen years I was master blacksmith of the Philadelphia Navy Yard, with approximately 250 blacksmiths. Now Shop Superintendent of the Forge Shop, Bait Anchor, with approximately 450 blacksmiths.
[fol. 32] In the meantime I have carried on a consulting engineering business. I am a registered professional en-

gineer in the States of Pennsylvania, New Jersey, and Florida, registered to practice structural engineering, civil engineering, mechanical engineering.

Q. Are you an instructor in any college or school?

A. Yes, for the past 11 years I have been instructor in physical metallurgy in the evening schools of Temple University. Concurrently for the last three years I have been instructor in the inspection and testing of metals in the United States Defense Courses as given by Drexel Institute of Technology.

Q. Does your work include the forging and inspection of such objects as shackles and other similar metals?

A. Certainly, sir, by the many thousands.

Q. Mr. Money did you at my request examine this shackle which has a tag on it marked "Shackle, Robin Sherwood, injury to Joseph Sieracki, December 23, 1942"?

A. Yes, sir.

Q. Now Mr. Money will you please explain to the Court and jury what you found from that examination?

A. This shackle very obviously has a gross defect. There is a large cavity in the center known in our trade as a pipe. From that cavity a crack——

Q. Will you point that out, please, to the jury and the Court as we go along? Would it be helpful if we took this apart?

A. I think it would.

Q. We don't need this base here, I don't think.

A. This has a large internal defect, a large cavity. That should be obvious to anybody.

Mr. Freedman: Will you show that to the jury, please?

The Court: Yes, I think you might as well show it to the jury.

The Witness: That is, of course, a very gross defect. Under certain conditions that might not be discernible, but [fol. 33] in this case the crack obviously extends from this cavity to the exterior surface or crown, as we call it. In my opinion, that defect was capable of having been seen from the surface at the time of manufacture, and in my opinion that crack has been doctored for the purpose of concealment as evidenced by the layer of metal here which appears to be raised above the surface——

By Mr. Freedman:

Q. Will you explain that for the record? When you say "here" you mean at the top of the shackle in the center of the U?

A. That would be sufficiently descriptive. In my opinion, this has been doctored for the purpose of concealing the crack, as evidenced by the raised layer of material at the crown of the shackle, as evidenced by a hump on the other piece, which, in my opinion, shows evidence of peening, and at the end of this hump is a characteristic triangular mark which, in my opinion, is evidence of the application of an acetylene torch.

By the Court:

Q. Will you explain to the jury what you mean by the word "peening"?

A. Peening is striking with a hammer for the purpose of upsetting.

Q. What do you mean by "upsetting"?

A. To move the metal, gather it in thickness at a particular point. This, in my opinion, appears to have been struck together for the purpose of closing or concealing a crack. This, in my opinion, shows evidence of deposition of additional metal at that point.

By Mr. Freedman:

Q. When you say "at that point" you refer to the point of the break on the shackle?

A. Where the break was, and, as I believe, for the purpose of concealing a crack. The triangular part here is char- [fol. 34] acteristic of the end point of an acetylene weld. The crack, in my opinion, extended originally for a distance of perhaps 2½ inches, was visible. The top or crown of the piece, in my opinion, was doctored, closed, so as to be concealed. By whom or when, I shouldn't undertake to say.

Mr. Money, is there any test which could have been used, any other test other than what you have mentioned here, which could have been used to determine a concealed defect?

Mr. Strubing: That is objected to, if Your Honor please.

The Court: Is there any other test, do you say?

Mr. Freedman: Yes, sir.

The Court: Why is that objected to?

Mr. Strubing: There is no pleading here that this wasn't properly tested.

Mr. Freedman: We say that they failed to make proper inspections.

Mr. Strubing: Is that different from testing?

The Court: I will overrule the objection.

A. When articles of this character are manufactured, in all shops with any pretentions whatsoever——

Mr. Strubing: I object to this, your Honor, as not responsive to the question.

The Court: I don't know whether it is or not. You can't tell. He hasn't finished his sentence. I think I will let him complete his statement.

A. —it is customary to inspect the shackle by suspending it or ringing it. A steel article, particularly a shape of this kind, if suspended by a wire, a cord surrounding an iron bar, and struck with another piece of metal for sound, will give forth a clear ringing note, and doubtful pieces will give approximately the same note. If there is a serious defect in the piece, as there obviously is in this one, that [fol. 35] note will be muted. The sound given forth will be dull, like when a broken bell or a broken dish, a saucer, a plate or glass is struck with something. If there is a crack in the glass, the sound is quite different from the sound of an article which is whole.

Even car wheels are inspected by the same process, and it is customary in shops that produce things of this kind for pieces of this sort to be tested by striking, and, in my opinion, this piece when manufactured, if subjected to that test, would have shown that it was not sound merely by this striking test.

Q. What is the maximum breaking weight of a metal as compared to the weight it is designed to carry?

A. Ordinarily articles of mild steel, such as this undoubtedly is, are designed to carry a safe load of one-quarter of the breaking strength. At approximately a half the breaking strength of mild steel the material commences to yield, so that the safe load is one-half of the yield point or one-quarter of the ultimate or the breaking point; so that ordinarily a piece is intended to carry a safe load of one-quarter of the amount it will take to break it or one-

half of the amount it will take to permanently distort it.

Q. If I were to tell you that the particular boom on which this shackle was tested was tested with a load of 12½ tons, would you say that would have been adequate to test its strength?

Mr. Strubing: That is objected to, if Your Honor please.

The Court: Put it another way. I do think the form of that question is objectionable. Why not ask him what load it should be tested for or something of that sort? You can't anticipate, in other words, what was done and what was not done.

By Mr. Freedman:

Q. Assume that this shackle was designed to carry a weight of 10 tons. What weight would you say or in your opinion would be proper to test it?

[fol. 26] Mr. Strubing: That is objected to.

The Court: I think that is all right.

Mr. Strubing: May I point out the ground of my objection, your Honor?

The Court: Yes, surely.

Mr. Strubing: It appears in this case that this ship was constructed and tested pursuant to a contract with the Maritime Commission. The Maritime Commission has its rules and regulations for testing, and the only question is whether we complied with those.

Mr. Freedman: No, sir. We don't care about any contract that they might have had with anybody else. The point is whether they used proper care under the circumstances.

The Court: I will overrule the objection. As I understand the question, it is: Assuming that the load to be carried by this shackle might reach as high as 10 tons, what breaking point should it have? How long should it be? The answer is obvious from your original question. Forty tons, isn't it?

The Witness: It would be presumed that if the piece had an ultimate strength of 40 tons, that the safe load would be 10 tons, but you wouldn't test it at 40 tons; otherwise you would destroy it. That would be a destructive test. Now, a safe test would be an amount of weight slightly under the amount of weight that would permanently deform the piece. If it were designed to carry 10 tons, it

should have a breaking load of not less than 40 tons; therefore, it should commence to yield at not less than 20 tons. The proper test load then would be something under the yield load. A customary figure is about $1\frac{3}{4}$ the safe load. Twice the safe load would probably give us a permanent set. $1\frac{3}{4}$ times the safe load would not cause a permanent [fol. 37] set if the piece were sound. An adequate test in this case would be about $17\frac{1}{2}$ tons. That in my opinion would be a proper test.

Mr. Freedman: Cross-examine.

Cross-examination.

By Mr. Evans:

Q. Mr. Money, you have indicated a hole in this shackle which you have called a pipe. When you speak of a pipe you refer to that little hollow place that my finger points to?

A. Yes, sir, or cavity.

Q. And that cavity is right in the center of that shackle, is it not?

A. It is nearly so. It is not far from the center.

Q. And all around that is sort of a crystal substance on each half of the two pieces of the shackle, is there not?

A. Not all around it, sir. This pipe and the crack accompanying it extends, in my opinion, to the crown of the shackle.

Q. Well, you are referring to this place where it came to the surface?

A. Yes, sir.

Q. But except for that line——

Mr. Freedman: Wait a minute. The witness wants to add something.

By Mr. Evans:

Q. Except for that line that you have indicated. We call this the top of the shackle, do we not?

A. Yes, sir, the crown.

Q. Right at the top or crown of the shackle it shows a crystallization on both halves of this shackle?

A. All metal in a solid condition is crystalline, popular belief to the contrary.

Q. And that crystallization that we see there indicates what to you?

[fol. 38] A. All metal in a solid cold condition is crystalline. The break there is not abnormal. The fracture is not abnormal.

By the Court:

Q. I don't know what you mean by "not abnormal."

A. The character of the fracture, the appearance of the fractured surface there, aside from the defect in the center.

Q. You mean it isn't different from other fractures?

A. It wouldn't be different from what you expect.

Q. But it is not normal to have fractures in shackles?

A. Well, oftentimes you will break them on purpose for test.

By Mr. Evans:

Q. In other words, Mr. Money, if that shackle had not had that pipe or defect in it, and you had put a load on it sufficient to break it, you were deliberately fracturing it, which you sometimes do to test metal——

A. Yes, sir.

Q. The entire break would have then appeared, both halves, crystallized, as most of that does?

A. Yes, metal is always crystalline in a solid condition.

Q. If it was a good piece of metal that was broken, the whole thing would have appeared crystallized, as those two halves do?

A. Sometimes the crystals are fine, sometimes they are coarse, but they are always crystals.

Q. That pipe or defect that is in that shackle, when did that get in the shackle?

A. It probably came from the ingot. When steel is poured into the steel mold, under certain conditions pipes sometimes form in the ingot, and as the ingot is elongated in the rolls and presses and hammers, that defect is drawn out in the form of a long thread which follows the piece through to the end. I presume that defect originated in the ingot when the steel was first cast.

Q. It is your opinion that that was a casting rather than a forging?

[fol. 39] A. Oh, no, no, but all steel has to be cast. Steel starts with the process of casting.

Q. That is when they make the ingot?

A. That is when the ingot is made. The ingot is then rolled or pressed or hammered and becomes wrought steel. This is wrought steel.

Q. That is done under terrific heat so that you can mold it?

A. It must be malleable.

Q. Can you tell us whether that shackle was made by pouring this metal into a mold the shape of the shackle or whether it is a forged body?

A. This is a forged shackle, definitely.

Q. When the forging was complete and that shackle was in the shape that you now see it, assuming that it wasn't broken, was that pipe in the middle of that shackle at that time?

A. Undoubtedly.

The Court: When? When it was poured?

Mr. Evans: When the forging was complete.

The Witness: However, in my opinion, the evidence of the crack extending to the surface was there.

Mr. Evans: I am coming to that.

By Mr. Evans:

Q. So far as the shape of the shackle is concerned, when that shackle was completed, when the act of manufacturing the shackle was completed, the pipe was in the center of it? You are positive of that?

A. Yes, sir.

Q. It is your opinion that from that pipe there extended a crack to the surface of the shackle?

A. Yes, sir.

Q. At that time?

A. Yes, sir.

Q. And that, of course, was before the shackle was galvanized, wasn't it?

[fol. 40] A. Yes.

Q. Would the galvanizing of that shackle conceal that crack in any way?

A. It would tend to do it if it were not noticed before galvanizing, yes.

Q. You state that it is your opinion that someone deliberately hit that track with a hammer to conceal it from view? That is correct, isn't it?

A. Yes, sir.

Q. And did they do a pretty good job of concealing it?

A. Yes and no. Some people might not notice that, but as a man who has walked the floor of forge shops for many years, learned the tricks of the blacksmiths, how they try to conceal their work, if I personally were to see that shackle, see this raised area there, see this little table here where it appears to have been beaten, see the little triangular mark there, I would say right away somebody is covering up. I think it would depend on who looked at the piece.

Q. You would say that if you had examined it before galvanizing, would you not?

A. Either before or after. If this shackle had been given to me in the unbroken condition and I were asked to examine that, I think I would say, "Well, somebody has doctored that shackle."

Q. How wide a crack do you think that was?

The Court: Pardon me. May I interrupt?

By the Court:

Q. Will you tell us just what galvanizing is?

A. Galvanizing consists of dipping the warm metal in a molten zinc at a temperature of about 800 degrees Fahrenheit, the surface having been previously prepared by pickling in acid.

Q. What does it do?

A. The zinc amalgamates with the steel and forms a thin layer on the outside which is very resistant to corrosion. [fol. 41] The purpose is to prevent rust, particularly on salt water applications.

The Court: Go ahead, Mr. Evans.

By Mr. Evans:

Q. You say that the crack extended to the surface. To which surface did it extend? The crown, the top of the shackle, or inside of the curve?

A. In my opinion, to the outside of the shackle, as evidenced by what I believe to be an attempt to doctor it.

Q. Did that crack come to the surface at the crown, the outside of the curve——

A. In my opinion, yes.

Q. Or——

A. No, not inside.

Q. It did not show inside the curve?

A. There is no evidence to that effect that I see.

Q. But there is evidence that it did extend to the crown?

A. In my opinion, yes, sir.

Q. You say galvanizing would have had a tendency to conceal that crack?

A. Yes, sir, it would.

Q. In your opinion, would that shackle have sustained a weight of 12½ tons?

A. It might easily have done so. It is a very common occurrence that a piece will lift a heavy load and immediately thereafter pick up a light load and break.

Q. And the reason for that is that the first load that is picked up has increased that crack or defect in size, hasn't it?

A. The crack is progressive.

Q. Sir?

A. Cracks of that sort are progressive. There is a phenomena known as the fatigue of metals. It is not at all unusual for a piece, as I have said before, to pick up a heavier load and afterwards fail under a lighter one.

[fol. 42]. Q. So it is perfectly consistent with your experience that this shackle with this defect would have lifted 12½ tons successfully?

A. It might have. Of course, I couldn't look at that break and say what it did lift or what it would have lifted, but if somebody told me that it lifted 12½ tons successfully, I wouldn't consider it at all unlikely.

Q. That is right; you would accept that. But you would say, would you not, that having lifted that weight of 12½ tons, the defect which existed before that lift was made became worse and the shackle became weaker by reason of lifting that 12½ tons, wouldn't you?

A. There is a possibility.

Q. And then subsequently the shackle is used again and lifts eight tons. It could, in your opinion, have lifted eight tons successfully, couldn't it, even after it had lifted 12½ tons?

A. It may have done so.

Q. But lifting that eight tons would have further weakened that shackle, wouldn't it?

A. Possibly. I don't say it is impossible.

Q. I mean it is plausible, with your experience?

A. There is this about it, though. Oftentimes we think we hook on to something that weighs eight tons. As a matter of fact, that may be foul on something. In the place of lifting the eight tons we are trying to pull the world up by the roots. That often happens.

Q. We have to assume in this case, Mr. Money, that this did not foul on anything, because Mr. Freedman, who called you as a witness, has already introduced testimony to show that it didn't foul on anything, so that is a possibility that isn't in this case. Your opinions must be based on simply lifting the dead weight of approximately eight tons.

You agree with that, don't you, Mr. Freedman?

Mr. Freedman: Very definitely.

Mr. Evans: You are not trying to change——

[fol. 43] Mr. Freedman: No, I resent that. I certainly agree with it. That is what I proved before.

Mr. Evans: What I said to Mr. Money is all right, isn't it?

Mr. Freedman: Perfectly all right.

By Mr. Evans:

Q. So that is out of the case. Then it is perfectly plausible that this defect having grown larger with each load, would finally fracture on the second eight-ton load?

A. Yes, sir, I would say so, definitely.

Q. Now, you said that the galvanizing process would tend to conceal this crack. That is correct, isn't it?

A. In that it formed a coating over the outside and does wash over, as much as a coat of paint would wash over certain minor defects. However, I think the crack had already been successfully concealed by a process of deposition of metal combined with peening.

Q. By "peening" you mean hammering?

A. Yes, sir.

Q. You anticipated my next question, which is: If you add to the galvanizing, painting, that of course would have a tendency further to conceal this defect, wouldn't it?

A. Yes, sir.

Q. So if that shackle were shown to you after it had been galvanized and painted, at the time it was delivered with a

brand new ship, do you think even you would have discovered that defect?

A. Perhaps not casually, but if I were asked to assemble this on a boom, the first thing I would have looked over, I would see a suspicious thing at the crown there. It looks to me as though somebody doctored that. I would then hang it up and ring it.

Q. Would you see that suspicious thing on the crown if it had been galvanized and painted?

A. Yes, sir, it is here right now. This piece has been galvanized and painted and has what, in my opinion, is a suspicious protuberance on the crown.

[fol. 44] Q. The paint is all worn off that part of the shackle that you are looking at now, isn't it?

A. That is right.

Mr. Freedman: There has been no change in the shackle since it came off the ship. This is the condition of the shackle as it existed on the ship while it was in place on the boom.

By Mr. Evans:

Q. There is no paint where you are indicating you see a suspicious mark, is there?

A. No, there is no paint there now.

Q. So you have an advantage over others who saw that shackle before, who saw it with a galvanizing coat and a painting coat?

Mr. Freedman: I object to that, sir. This is the condition of the shackle as it came off the ship.

The Court: The objection is overruled.

A. The paint would not conceal the lump, sir. I grant you the paint would probably conceal the crack, but it wouldn't conceal the lump. The lump is still there, paint or no paint.

Q. How wide do you think that crack was, Mr. Money?

A. That would be microscopic. It might be thousandths of an inch or less. There might technically be no space between there. It might be crowded together, but the crack or separation or parting line undoubtedly exists there as evidenced by the plane of fracture.

Q. When you say the crack is microscopic, you mean by that it cannot be seen by the naked eye? You have to see it through a microscope?

A. No, you can see a thing that you can scarcely measure with a ruler.

Q. Then you don't mean it was microscopic?

A. "Microscopic" was perhaps a bad choice of words. I should have probably said the crack was probably a couple of thousandths of an inch wide, or something like that.

[fol. 45] Mr. Evans: Excuse me just a minute.

(The witness struck the two parts of the shackle with a pocket knife.)

By Mr. Evans:

Q. How does that ring now?

A. Those pieces are apparently sound. One has a different note from the other, but I don't detect in there any particular evidence of any further cavities.

Q. You would say there are no other pipes in either?

A. Probably not. However, that is partly established by this. When you have a number of pieces of the same size and contour and you ring one, you expect the next one to have the same note, and the fact that nine of them ring with one note and the tenth one rings with an entirely different note, that in itself may be cause for suspicion. However, if the fracture is bad and if it is transverse, you will not get a ring; you will get a dull clack.

Q. Do you think you would have gotten a dull clack if you had tapped that shackle with a piece of metal?

A. In my opinion, yes, sir, particularly because the crack is so large there and is transverse. Yes, definitely so. In my opinion, a ring test there would definitely have revealed the fact that the shackle was defective.

Q. And that, of course, was so as soon as the shackle was manufactured?

A. Yes, sir.

Q. When the shackle w. galvanized, if it had a crack in it, the galvanizing material would have gotten into that crack, would it not?

A. Not to amount to anything, no.

Q. Will you examine that crack and tell us whether there is any galvanizing material in the crack?

A. That is something you couldn't tell with the naked eye.

Q. You couldn't?

[fol. 46] A. No. However, I doubt—if the crack was thin, it is very doubtful whether it would have flowed down through. It is like putting a coat of molasses on something.

Q. You examined this shackle, I believe, in my office in the Lewis Tower Building, did you not?

A. In some office.

Q. You remember examining it in the Lewis Tower Building, 15th and Locust?

A. Yes.

Q. What equipment did you have with you to make that examination?

A. Nothing but a penknife.

Q. You didn't have a microscope?

A. No, sir.

Q. You didn't have a magnifying glass?

A. No. Those things would have been no good. To examine that with any effect at all, you have to take a cross-section out of the piece and you have to polish it with polishing equipment and examine it under a metallurgical microscope, which is an instrument much larger than that table there. Any examination of this with a small hand magnifying glass would not mean a thing, sir.

Q. But in your examination you did not find or you do not find now any evidence of any galvanizing material being inside of the crack, do you?

A. I wouldn't say that it is or isn't. I don't say that it is or would be with the crack closed.

Q. I am asking you whether now——

By the Court:

Q. All he wants to know is whether now you can say yes or no.

A. No.

By Mr. Evans:

Q. There is none there now, is there?

A. I would be inclined to say not, but I shouldn't even say that much, because there is no way of telling unless you [fol. 47] do subject that to a metallurgical examination with a metallurgical microscope.

Q. Are you what they call a metallurgist?

A. I have studied it and graduated from an advanced course in metallurgy and have taught it for eleven years, but I don't know whether I would be so brash as to call myself a metallurgist. Many other people have called me a metallurgist. I have given many lectures on metallurgy and written many articles on metallurgy.

Q. Do you have to have a degree to be a metallurgist?

A. No.

Q. You don't have one, do you?

A. I have three degrees in engineering.

Q. I am asking you now whether you have a degree as a metallurgist. I just want an answer to that question.

A. No, sir.

Q. We will drop that subject and go on.

A. I am licensed in the State of Pennsylvania to practice metallurgy.

Q. You said that in your qualifications. I understand that. You said that you believed that someone deliberately took a hammer and hammered about that crack. If that was done, that was done, of course, at the time the shackle was manufactured and before galvanizing, was it not?

A. I would presume so, yes.

Q. And you say in your experience you have known that to occur lots of times?

A. I don't quite get the question. Known concealment of that sort to have occurred?

Q. Yes, you testified——

A. Yes.

The Court: May I interrupt at this point, because I want to get this clear.

By the Court:

Q. You say that the shackle definitely shows evidence of being subjected to some process designed to conceal a crack? [fol. 48] A. In my opinion, yes, sir.

Q. Will you tell me, in your opinion, as well as you can, just what that process consisted of? You have given us three things, but what did they do exactly, in your opinion, if you can give it?

A. Yes, sir. In my opinion——

Q. Just tell us what the process was. What do you think the blacksmith or the forger or whatever you call him did who tried to do that job? Just what do you think he did?

A. The blacksmith, if he were to conceal that, if he wanted to conceal that, if he were a dishonest workman, if he were working piecework, or if he didn't want to get in bad with the boss——

Q. Not what his motives were. What do you think that man did who did that job?

A. If you wanted to conceal a crack of that sort you would have at least two methods——

Q. I don't think you are answering what I am asking you, though. I realize there are various methods of concealment. What do you think the man who did that job did?

A. I believe that he heated that with an acetylene torch. I think there was material added there with an acetylene torch followed by a peening process. Now, if you will notice here, sir, at the end of this there is a triangular lump there. That triangular lump there is characteristic of the ending point of a bead of acetylene weld, and, in my opinion, this is a bead of acetylene weld. That is a bead of acetylene weld, and the beads of acetylene welding have been followed by a hammer process to smooth them down and close them together. Furthermore; this lump, which is very appreciable on this side, in my opinion is metal which has been added on there after the weld and beaten down, in my opinion, to conceal the existence of the crack.

Q. Then, according to your view, he added metal twice? [fol. 49] A. Probably.

Q. He added metal first with the acetylene torch or during that process, and, second, when that was through, he added some more and hammered it on?

A. He gathered it and consolidated it and painted it, as I believe.

Q. All right, I understand.

A. Now, that possibly could be confirmed with a metallurgical microscopic test. It cannot be confirmed with the naked eye, but in my opinion that is what happened there.

Q. What do you mean by "there." You say that could be confirmed?

A. The fact whether or not weld metal has been added probably could be confirmed with a metallurgical test under the microscope, not an ordinary hand glass.

The Court: Go ahead. I just wanted to get that clear.

By Mr. Strubing:

Q. Mr. Money, it is not unusual to have a pipe in metal stock, is it?

A. Yes, and no. We hope that we don't have them, but occasionally we do run into defects.

Q. Well, oftentimes you have a pipe in stock metal and that is made into a shackle and the shackle will give good service for years, won't it?

A. I would say that would be hardly likely, because defects of that sort do increase with use. They predispose the material to what we call a fatigue failure. Unless the shackle were greatly overdesigned or unless it were greatly underworked in proportion to its design, a gross defect of that sort would probably come into evidence pretty quickly.

Q. Will you say it is impossible to have a shackle designed for a 10-ton weight to have a pipe in it and be used for weights up to 10 tons and never break?

A. It would depend on how many times it is used. Of course, metal will break eventually if used millions enough times.

[fol. 50] Q. Isn't it possible—I am not saying it is probable, but isn't it possible—that such a shackle could serve just as long as a shackle without a pipe in it?

A. Oh, no.

Q. You don't think so?

A. No, indeed. No, definitely not.

By the Court:

Q. Let us put it this way: Is it possible that a shackle designed for a 10-ton load and not subjected to what you call undue load or improper load, used for the purpose for which it is intended, might live its entire useful life without breaking, even though it had a pipe in it?

A. That I would say yes.

The Court: That, I think, is what counsel means.

The Witness: Yes.

By Mr. Strubing:

Q. This pipe, I believe you said, was in the original stock metal before it was bent to shape?

A. In my opinion, yes.

Q. That piece of metal was then forged to a shackle. Now, just what is forging?

A. Forging is the process of changing the shape of metals by heat, hammering, or pressure.

Q. You use heat in any case, don't you?

A. Oh, yes, it is not forged unless it is heated—by definition.

Q. And then it is hammered into shape?

A. Hammered or pressed.

Q. Can you tell whether this was hammered or pressed?

A. This is probably a drop forging.

Q. That means you hammer it with a mechanical hammer?

A. Yes, sir.

Q. And you hammer it all over the top there to get that shape in it?

[fol. 51] A. There is two ways of doing it. Bar stock of this diameter may be placed in the machine, a heavy ram come up and upset a ball on the end. Afterwards, in another machine this may be pierced. Or you may start with a piece of larger size, draw that down to a dumb-bell shape, that is, draw the center, leave a ball on the end, then flatten and pierce the ball and then bend the shackle. I don't know which of the two ways this was done. I am inclined to think it was probably balled on the end. Now that you ask the question and I look for the parting lines on the piece here, I am inclined to think that this was made by an upsetting process. In other words, I am inclined to think this was a piece of bar stock upset and balled on the end and pierced.

Q. And how was the curve gotten in the middle of the shackle?

A. If there is only a few pieces it is done in what we call a bending slab, a large slab in which there are holes and pins, and they have what they call a moon-bar to push that around with. If there are a large quantity, it is done under bending dies. There are rollers on each side, and a male piece comes down, its curvature corresponding to the curve of the piece there, and the rollers have a similar curvature, and the passage of this male tool down will push the bar into a U-shape, the rollers preventing the scarring of the piece.

Q. It can also be done by the use of a drop hammer?

A. It would never be done by a drop hammer, no, sir.

Q. Can it be bent by a drop hammer?

A. It wouldn't be practicable, no. If you say "can," yes, it can.

Mr. Freedman: You may explain that if you wish.

Mr. Strubing: I don't know what there is to explain. If it can, it can.

The Court: I think it is clear enough.

The Witness: It wouldn't be a practicable way of bending them.

[fol. 52] By Mr. Strubing:

Q. And it can also be bent by hammering it by hand, can't it?

A. Well, as distinct from the table, yes. It would generally be bent on a table with a moon bar. It could be bent by hand hammering; it could be bent under a steam hammer. There are various ways it could be bent.

Q. You can't tell us how this was bent, can you?

A. No, sir.

Q. It may have been hammered by a steam hammer? It may have been done in any of the ways you have suggested here?

A. Yes, sir.

Q. It might even have been bent in the ways in which I said it was possible to do it?

A. That is right, but none of those ways would gather a lump of metal on the crown, not one of them.

Q. You get that in. That is a good point.

A. On the contrary, they would thin it. The metal as it is bent over tends to stretch on the outer radius and to compress on the inner radius, so that you often find a scarcity of metal on the convex part of the piece.

Q. I am thinking of a point that you don't think I am thinking about. Before that was bent, however it was bent, there was no fracture to the exterior of the surface, was there?

A. There may have been and may not have been.

Q. It is probable that there wasn't, though, isn't it?

Mr. Freedman: I object to that, sir. It is too far in the realm of conjecture.

The Court: Oh, no.

A. I don't think anybody could say whether it is even probable that it existed or did not exist.

By Mr. Strubing:

Q. Have you tested bars of metal like this? Have you cut them open to see if there were pipes in them?

[fol. 53] A. We generally don't take a piece at random. We presume that a piece that we get from a mill is all right, and we hope it is, but frequently—not maybe frequently—but every once in a while we do have cases of trouble.

Q. I am talking about testing. You have done experimental work?

A. Yes, lots of it. I have been a laboratory instructor for years.

Q. You have broken metal, cut it apart, taken sections of it?

A. Yes, whenever we get a suspicious piece. We are only too glad to get that for purposes of instruction.

Q. You have even made pieces that you knew were faulty and have broken them apart?

A. That is true.

Q. You can get a pipe in that stock any time you want to, can you, if you intend to do it?

A. That can be done in a steel mill. The ordinary blacksmith shop gets this in the form of bar stock. This is ordinarily not made locally; it is made in the steel mill and shipped to the manufacturer in the form of bar steel.

Q. The steel mill can put pipes in it if they want to?

A. If they deliberately set out to purposely make a pipe, I think they can probably do it.

Q. Of course, you can get a pipe in a stock in a forge shop by getting a forging fault in it, can't you?

A. It is possible to miswork a piece of steel so as to have a cavity in the center. If the piece is worked too cold and rolled too many times, you can break down the interior structure, but this is definitely not done that way.

Q. Or if you go from a flat to a round too fast?

A. What we call a cold shut. That is a different condition.

Q. In the pipes you have seen, wouldn't you agree that you have seen more pipes in stock which didn't have a crack to the surface than those which did?

A. Probably so, yes.

[fol. 54] Q. So that the probabilities are that this pipe, before this was bent, did not extend to the surface of that steel bar?

A. That might easily have been so before the bar was bent.

Q. It is probably so, isn't it?

A. I wouldn't commit myself "probably," although I wouldn't dispute with anybody that did say so. It wouldn't be at all unlikely, in my opinion. The pipe could very well be concealed in the center of the bar without exterior evidence. I agree with that.

Q. Do you know how long that pipe is?

A. There is no way of telling except to examine it visually there. It appears to be, oh, probably a half inch that you can see, and there is no way of knowing without taking a cross section how much further it extends.

Q. Could you tell it by X-ray?

A. No. Well, partly and partly not because the X-ray shadow there would taper off there. The best way, if you really want to know, is to take a cross section.

Q. Your best opinion on visual observation is that it is about a half inch long?

A. I would say that; yes.

Q. And that was extending lengthwise in this bar before it was bent?

A. Yes.

Q. And then this bar was bent, and you say that made a crack in it or there was a crack in it before?

A. In my opinion, there was a crack there because somebody tried to cover the crack up, in my opinion. If somebody hadn't seen the crack, they wouldn't have tried to cover it.

Q. Well, now, that crack would be the same or approximately the same length as the pipe, wouldn't it?

A. Oh, no, no.

Q. You don't think so?

[fol. 55] A. It might be longer; it might be shorter. It might change from day to day, week to week.

The Court: You mean the crack or the pipe?

By Mr. Strubing:

Q. The crack would be the same length as the pipe?

A. Not necessarily, no, sir.

Q. Have you examined it to see whether there is any crack on the surface extending along the pipe there?

A. You can't tell without a destructive examination. If a person were permitted to take this to a laboratory and

make a detailed, lengthy examination, you could tell quite a few more things. Whether they would be of any value or not, I don't know, but with a visual examination there isn't too much that you can see.

Q. That kind of test or examination would give the whole story beyond any doubt on this thing, wouldn't it?

A. No, I wouldn't say so even then, no. No, there would still be plenty of qualifications, but it would tell you probably whether material had been deposited, as I believe has been. It would tell you the length of the crack as it now exists. It would tell you whether or not spelter, which is zinc or galvanized process, had entered into the cracked surface there. Those things it would tell you, but what they would mean is again subject to interpretation.

Q. That crack still exists in the shackle, doesn't it?

A. Oh, yes.

Q. And it may run back as far as the pipe runs back?

A. In my opinion, yes.

Q. It may run back as far as the pipe runs?

A. Yes, it may run farther or it may be very short.

Q. And it may extend as close to the surface as the crack you are speaking of which caused the break?

A. I didn't get that, sir.

Q. You said there was a crack that extended, in your opinion, to the surface of this shackle?

A. Yes.

[fol. 56] Q. The crack that is still in that shackle would extend as far as that crack you are speaking of, wouldn't it?

A. I am perhaps a little dumb. I don't quite get the conclusion there.

Q. Is it the same crack? Let us put it that way.

A. You have here, in my opinion, a cavity pointing towards the crown of the shackle, and, in my opinion, you have a crack extending from the point of the cavity to the crown of the shackle, and, in my opinion, that crack extends along the crown of the shackle to an extent which I can't tell you, but it appears to me that that crack has been covered by the deposition of metal subsequently for the purpose, as I believe, of covering the evidence of that crack.

The Court: We have that. I don't think you need to repeat that.

By Mr. Strubing:

Q. You can't see the crack there now along the top crown, can you?

A. In my opinion, there has been a crack there, still is underneath there. That crack has been covered by this layer of metal here, which has apparently been deposited with an acetylene torch and beaten down with a hammer.

Q. That covering up, as you term it, was done in the finishing shop, wasn't it?

A. I would say I would presume so. Nobody knows, but since the covering up material is covered with a galvanizing coating, and since I can't conceive of anybody else going to the trouble to do such a thing, and since I am familiar with the habits of blacksmiths, some of whom like to pass bad work when they can, I am sorry to say, I would suppose that that was done at the time of manufacture.

Mr. Strubing: That is all. Thank you.

[fol. 57] Re-direct examination.

By Mr. Freedman:

Q. Mr. Money, did any of the metal deposited by the acetylene weld find its way into the pipe?

A. You can't see any evidence of it.

The Court: He says he doesn't know. Don't ask the same question.

Mr. Freedman: That is all.

The Court: I will recess for ten minutes.

Mr. Freedman: If the Court please, can we recess until two o'clock? I have tried to get my doctors here, but they can't make it this morning.

The Court: No, you can't do that.

Mr. Freedman: My medical witnesses are next. One is in the hospital now. He is operating this morning.

The Court: Can't you go ahead and call the medical witnesses later? They have nothing to do with the accident or the facts to be developed.

Mr. Evans: I have no medical witnesses here now.

The Court: Is there any reason why you can't go ahead with your case? Is this the last witness you have, Mr. Freedman?

Mr. Freedman: On the facts, sir. The rest of mine are medical.

The Court: Is there any reason why you can't go ahead now with your case and then recall Mr. Freedman's witnesses? It doesn't make any real difference. As a matter of fact, I have often thought it would be a very good idea to try the case on the facts first and postpone all medical testimony until later on. In many of these cases I don't see why it shouldn't be done. You will frequently find a case that [fol. 58] will never get to the medical testimony. You would save a great deal of time that way.

Mr. Evans: If Mr. Freedman is at the end of his case except for medical testimony, then this is an appropriate time for me to make a motion that I have in mind.

The Court: Yes. Well, I will be glad to hear you on a motion. Do you state, Mr. Freedman, that you have no more testimony to offer except medical testimony?

Mr. Freedman: That is right, sir.

The Court: All right.

Mr. Evans: I just have one question I would like to ask this witness.

The Court: All right, ask him one question.

Mr. Evans: And then after the ten-minute recess we will have something to go on with. We won't waste the Court's time.

By Mr. Evans:

Q. When Mr. Strubing was examining you, you said that you assumed that that crack which was covered extended for some distance. You didn't know how far. Will you tell us how far the metal extends which you say has been added to conceal it.

A. I would say on this element of the shackle in the neighborhood of 1¾ inches.

Q. 1¾ inches. Therefore, since you say you assumed the crack was visible, because of this evidence of concealing it, then you would assume that that crack would run for 1¾ inches, wouldn't you?

A. Not necessarily. They probably carried the sealing metal a little past the end of the crack.

Q. But it would run almost that distance?

The Court: Either one of us can make as good a judgment on that as he can, I should think.

[fol. 59] Mr. Evans: Well, he's speculating.

The Court: Whoever did the job, in his opinion, put on an inch and three-quarters of extra metal. Whether that was more than they needed or just what they needed or a great deal more, nobody can say.

By Mr. Evans:

Q. That was on one side. Now, how much on the other side?

A. I would say about an inch and a half.

Q. About an inch and a half on the other side?

A. Terminating in the characteristic welding point of an acetylene weld bead.

(A ten-minute recess was taken at 11:25 A. M.)

* * * * * * * *

The Court: I will allow the amendment.

OFFERS IN EVIDENCE

Mr. Evans: If your Honor please, I desire to offer in evidence paragraph 6 of the order bringing in the Third-Party defendant, which paragraph reads as follows:

"6. Bethlehem Steel Company constructed or caused to be constructed the vessel known as Hull No. 4350 and on or about July 16th, 1941 it was sold and delivered to the United States Maritime Commission. On the same date it was delivered by the United States Maritime Commission to Seas Shipping Company, Inc. in accordance with the contract dated April 4th, 1940."

Now, in the Third-Party defendant's answer, paragraph 6 reads as follows:

"Admitted."

Mr. Strubing: I will have to move to amend again. I didn't know I had made the same mistake twice, your Honor.

The Court: Let it be amended.

[fol. 60] Mr. Strubing: Therefore, the objection to that offer, as it includes the word "sold," will be allowed?

The Court: I am allowing the amendment, yes.

Mr. Evans: But the admission will stand as to the delivery of the ship to the Maritime Commission, and the delivery of the vessel by the Maritime Commission to us?

The Court: Oh, yes.

Mr. Evans: On that date. Now, of course, it may be—I wish your Honor would indulge me for a few minutes. You see, this is a very important amendment, and it may necessitate my pleading surprise. Our cause of action over is based on a sale, and we therefore had a right to rely on these pleadings when we came into Court that the sale was admitted. Now, if we have to prove a sale, it is a matter that I——

The Court: Isn't it a matter of merely offering the contract, which you have and have had for some time, according to Mr. Strubing?

Mr. Evans: Well, our contract is in the pleadings too.

The Court: I don't think it makes much difference what you call it—that is, whether it is admitted that it was a sale or not. I will have to construe it. If the question arises I will have to determine whether it was a sale or not, and I don't know what other evidence you need to introduce; however, it is for you to say what course you want to take.

Mr. Evans: The pleading, of course, stands amended, but if it was not a sale, I certainly do not know what it was—how we got title to the ship. We did not steal it.

Mr. Byrne: The contract is in the pleadings, your Honor.

[fol. 61] The Court: Yes; certainly.

Mr. Evans: Your Honor, I also desire to offer a stipulation of certain facts that Mr. Strubing and I have agreed upon, also to eliminate bringing in contracts——

The Court: All right.

Mr. Evans: —plans, specifications, and various other things. The stipulation reads as follows:

"It is hereby stipulated and agreed between Rowland C. Evans, Jr., Esq., counsel for defendants Seas Shipping Company, Inc. and Robin Line, and Philip H. Strubing, Esq., counsel for third-party defendants Bethlehem Steel Company and Bethlehem Sparrow's Point Shipyard, Inc., that the following facts are true and correct, and shall be deemed admitted by said parties for the purpose of this action:

1. The vessel known as the S. S. 'Robin Sherwood' was constructed at Sparrow's Point, Maryland; and identified

as Hull 4350. Construction was commenced by Bethlehem Steel Company on October 10, 1940 and continued by it to June 3, 1941, and was completed by Bethlehem Sparrow's Point Shipyard, Inc. from June 3, 1941 to July 16, 1941, pursuant to contract between said corporations dated June 3, 1941, under which Bethlehem Sparrow's Point Shipyard, Inc. acted as an independent contractor.

2. From September 25, 1939 until the delivery of Hull 4350 to the United States Maritime Commission, George G. Sharp, Naval Architect, was authorized to and did act as the agent and representative of the Commission to prepare or approve all plans, specifications and drawings in connection with Hull 4350 and to supervise the construction of Hull 4350 to the extent of assuring that such construction conformed to such plans, specifications and drawings, [fol. 62] and all requirements of the Commission. During said period Harold Pearlman, A. O. Evelyn and C. Middleton were authorized representatives of George G. Sharp.

3. On June 2, 1941 Bethlehem Steel Company purchased from W. H. McMillan's Sons a block, including galvanized shackle, identical with that shown in McMillan Catalogue No. 95, Page 556, Figure 4585"——

The Court: Who purchased it?

Mr. Strubing: Bethlehem Steel Company.

The Court: Bethlehem Steel Company.

Mr. Evans: —"with a distance between the center of the shackle pin and the center of the shackle bow wire of 12 inches. The block, including shackle, so purchased was painted and installed by Bethlehem Sparrow's Point Shipyard, Inc. at the boom end of the ten ton boom at the main mast of Hull 4350."

Mr. Freedman: These are stipulations between the two defendants, sir, and plaintiff has nothing to do with it.

The Court: I will recess for ten minutes. Are you ready to go on with some evidence?

Mr. Evans: Yes, sir; I will have some more. I have a deposition. We have the deposition of Harold Pearlman, the representative of the architects. We have the deposition of the Master of the vessel. We have metallurgists, and some doctors. We have much more than we need for this afternoon.

The Court: All right; ten-minute recess.

(At 3:25 P. M. there was a recess of ten minutes.)

[fol. 63] After Recess

Present: Counsel as before noted.

Mr. Evans: If Your Honor pleases, I would like to continue with the offers of pleadings. The third-party complaint——

Mr. Freedman: Which one are you reading from?

Mr. Evans: The third-party complaint against the Bethlehem Steel Company. In the third-party complaint against the Bethlehem Steel Company, Paragraph 3, it is averred as follows:

"Under date of September 25th, 1939 the United States Maritime Commission entered into a contract with Bethlehem Steel Company under the terms of which Bethlehem Steel Company agreed to build and, upon completion, sell a single screw cargo vessel, Hull No. 4350, which was later designated and christened 'Robin Sherwood.'"

Paragraph 3 in the answer is admitted.

Mr. Strubing: If Your Honor please, I move to amend the answer to change the word "sell" to "deliver."

The Court: All right, I will allow the amendment.

Mr. Freedman: Which answer are you talking about now, Mr. Evans? Bethlehem Sparrow's or Bethlehem Steel?

Mr. Evans: Bethlehem Steel.

Mr. Freedman: All right.

Mr. Evans: Paragraph 4 of the complaint reads as follows:

"The terms of said contract provided, inter alia"—I will withdraw that, because the contract is later pleaded and admitted.

[fol. 64] Paragraph 5 of the complaint reads as follows:

"On April 4th, 1940 the United States Maritime Commission and Seas Shipping Company, Inc. entered into a contract under the terms of which Seas Shipping Company, Inc. was to purchase Hull No. 4350 referred to above, and became the buyer referred to in Article 35 of the contract between the United States Maritime Commission and Beth-

lehem Steel Company, as referred to in the Fourth Article of this Complaint. It thereafter was entitled to all the rights and privileges thereunder provided."

I desire to offer that, with the qualified admission of Paragraph 5 of the answer which reads as follows:

"Admitted, except that it is denied that defendant, Seas Shipping Company, Inc., became entitled to all the rights and privileges provided in the contract between the United States Maritime Commission and Bethlehem Steel Company or in Article 35 thereof."

In other words, it is all admitted except that last sentence, which, of course, is a legal matter.

Paragraph 6 I have already offered.

I desire to offer in evidence Paragraph 9 of the complaint which reads as follows:

"When Hull No. 4350, known as the 'Robin Sherwood' was delivered by the United States Maritime Commission to Seas Shipping Company, Inc. on July 16th, 1941, it was in the same condition as when sold and delivered by Bethlehem Steel Company to the United States Maritime Commission on the same date, the United States Maritime Commission having held title only for the purpose of acquiring a lien and passing title to Seas Shipping Company, Inc. in accordance with the contract dated April 4th, 1940."

Paragraph 9 of the answer admits all of that except that it is denied that the United States Maritime Commission [fol. 65] held title only for the purpose stated. Now, that in part is denied, but the reason for my offer is the admission that we received the vessel in the same condition as the Maritime Commission received the vessel.

Mr. Strubing: If Your Honor please, to keep the record straight, I move to amend that paragraph of the answer to strike out the admission that the vessel was sold.

The Court: The amendment is allowed.

Mr. Evans: I desire to offer in evidence Paragraph 12 of the complaint, which reads as follows:

"A true and correct copy of the contract between the United States Maritime Commission and Bethlehem Steel Company dated September 25th, 1939 is attached hereto as Exhibit 'B' and a true and correct copy of the contract of April 4th, 1940 between the United States Maritime Com-

mission and Seas Shipping Company, Inc. is attached hereto as Exhibit 'C'."

Paragraph 12 in the answer is admitted. They are true and correct copies.

* * * * * * *

Mr. Evans: I offer the deposition of Captain Earl J. Bonn, taken at the offices of Krusen, Evans and Shaw, Lewis Tower Building, Philadelphia, Pa., on March 28, 1944, at three o'clock P. M., pursuant to notice. M. V. Tobin, Notary Public.

[fol. 66] Present: Freedman and Goldstein, Esqs., by Abraham E. Freedman, Esq., for Joseph Sieracki.

Krusen, Evans and Shaw, Esqs., by Rowland C. Evans, Jr., Esq., for Seas Shipping Co., Inc.

Evans, Bayard and Frick, Esqs., by Philip H. Strubing, Esq., for Bethlehem Sparrow's Point Shipyard, Inc.

"Earl J. Bonn, having been duly sworn, was examined and testified as follows:

Direct examination."

Mr. Evans: (Addressing the jury.) You understand, of course, that Mr. Byrne is an associate of mine, but just to make it easier to follow, he is going to answer the questions the way Captain Bonn did when we examined him.

(The deposition of Earl J. Bonn was read to the jury by Mr. Evans and Mr. Byrne, as follows:)

"By Mr. Evans:

"Q. Where do you live, Captain Bonn?

"A. Well, my address is 39 Cortlandt Street, New York. I live aboard the ship; I have no other home or residence, and at various hotels.

"Q. How long have you followed the sea?

"A. I first went to sea in 1915, May.

"Q. And you have been going to sea ever since?

"A. Yes.

"Q. What licenses do you hold?

"A. Well, now, I hold a master's license, and have for a good many years.

"Q. At the present time what vessel are you serving on?

"Q. 'Robin Sherwood.'

"Q. In the capacity of master?

"A. That is right.

[fol. 67] "Q. When and where did you join the 'Robin Sherwood'?

"A. I joined the 'Robin Sherwood' at Sparrow's Point in 1941, sometime before she was delivered to the owners.

"Q. When she was delivered to the Seas Shipping Company—is that your employer?

"A. That is right.

"Q. When she was delivered to the Seas Shipping Company in what capacity did you serve on her?

"A. Chief Officer.

"Q. And when were you made master?

"A. In January, 1942.

"Q. And you have been master ever since?

"A. The exact date—do you want when it was delivered to the owners? That was about July 15, 1941.

"Q. At that time was the vessel completed?

"A. Yes, the vessel was completed and turned over to the owners.

"Q. Now, will you describe the arrangement on the vessel with reference to No. 5 cargo boom, how that boom was rigged—what was the boom fastened to, first of all?

"A. The whole cargo rigging on No. 2 consists of two 5-ton booms and one 10-ton boom."

The Court: Isn't it possible to skip a good deal of this? There isn't any question about the occurrence of the accident or how it occurred or the boom or the tackle there. Can't you skip that? Isn't a lot of that immaterial? Don't do it if you don't think you can, but it does seem to me that——

Mr. Evans: I think Your Honor is right, but it is very short, and I am afraid I will leave out something that I might need later on. I think we will finsh this in about five minutes. It isn't long.

[fol. 68] Mr. Byrne: It is only fourteen pages, Your Honor.

(Reading of deposition continued.)

"* * * The topping lift and the fall on the 10-ton boom are on separate drums, and are connected with

two winches in such a way by manipulating a clutch you engaged them or disengage them whether you want to use them or not.

"The 10-ton boom, when it is not in use, is carried in a vertical position and secured in place by two turn-buckles and lugs which are secured to the mast table.

"Q. So that this 10-ton boom is carried in an upright position parallel to the mast when it is not in use?

"A. That is right, and all the gear is also left in place, such as the topping lift, falls or guys, are all rigged.

"Q. What about the block and shackle on the end of the 10-ton boom?

"A. That is left in place, too.

"Q. That is all rigged, ready for use at all times?

"A. That is right; you can rig it in about twenty minutes.

"Q. Were you present on the 'Robert Sherwood' when this 10-ton boom was tested for lifting the weight for which it was designed?

"A. I was.

"Q. Will you tell us what was done?

"A. Well, I and Mr. Pearlman, representing the Bethlehem Shipbuilding Company at Sparrow's Point—we tested all the booms and cargo gear aboard the ship."

Mr. Freedman: Objection withdrawn. At that time there was some question as to who the defendants were going to be, so unless I indicate to the contrary, my objections are waived, sir.

Mr. Evans: All right, I will ask the question again.

(The reading of the deposition was continued.)

[fol. 69] "By Mr. Evans:

"Q. Will you tell us who were present and who the various persons represented at the time the test of the 10-ton boom was made?

"A. Mr. Pearlman, who represented George Sharp, the architect I do not recall the name of the Bethlehem Shipyard representative, and myself.

"Q. But there was a representative from the Bethlehem Shipyard?

"A. That is right. He was in charge."

The Court: What was the date and place, did he say?

Mr. Byrne: He said approximately July 15, Your Honor. This is on page 3 of the deposition.

Mr. Strubing: The date and place hasn't been developed yet.

Mr. Byrne: Excuse me, Mr. Strubing.

Mr. Evans: I have reached where it says "The Witness." You read there.

What do you say, Mr. Strubing?

Mr. Strubing: I withdraw my objection.

"The Witness: He was in charge of conducting the test—he was in charge of the test.

. . . . . .

"By Mr. Evans:

"Q. Will you tell us what tests were run; what was done?

"A. Well, they had large pieces of steel which had been weighed. The requirements were for 25 per cent overload of the specified capacity of the boom——

. . . . . .

"By Mr. Evans:

"Q. All right, go ahead and answer.

"A. I actually saw the weights weighed and these pieces of steel had the weights marked on each slab. There were [fol. 70] four or five different weights which made up the 12½ long tons.

"Q. And what was done with this weight?

. . . . . .

"The Witness: The weights were hooked on to the block of the boom and the weights were lifted; the boom was topped and swung from one side of the vessel to the other—from the port side to the starboard side, as these weights were on a barge, on a lighter, on the port side of the ship.

"The boom was then lowered to an angle of 30 degrees of the horizontal.

"The boom with the topping lift was topped so that the weights were in a position corresponding to the first section of the forward end of the hatch, the first section of the hatch.

"After the tests were completed the weights were again lowered onto the barge, and that completed the test.

"By Mr. Evans:

"Q. In what capacity were you present at this test?

"A. I was there in the capacity of an observer for the Seas Shipping Company.

"Q. Now, was this 10-ton cargo boom used again after that time?

"A. No, we never used the cargo boom for any lifts, or for loading or discharging any cargo from that time until we started to load these flat cars here in Philadelphia.

"Q. That was December 23, 1942?

"A. Somewhere around Christmas, I don't exactly remember the date; I didn't bring any data with me.

"Q. It was when this accident had happened to Sieracki?

"A. That is right.

[fol. 71] "Q. Were you on board the vessel when the accident happened to Sieracki?

"A. I was.

"Q. Will you please go back to the time when the ship was in commission, was the block and tackle and other fittings on the vessel painted at the time that the vessel was delivered?

"A. Yes, she was complete and painted with a priming coat and at least two coats of aluminum and other paint, according to the color scheme we had at that time.

"Q. By whom was that painting done?

"A. By the Bethlehem Shipyard at Sparrow's Point, Maryland.

"Q. Now, after the vessel was delivered was there any painting done?

"A. Yes, considerable painting was done.

"Q. By whom was that painting done after the vessel was delivered?

"A. Well, by the crew of the ship and by outside paint contractors.

"Q. Where was the vessel at the time you were made master?

"A. The vessel was in New York.

"Q. And that was in December of 1941?

"A. No, that was in January or February of 1942.

"Q. All right. Now, from that time on was the vessel painted?

"A. Yes, quite a number of times; she had been painted gray—the trip I went on as master, the Shipyard people

came aboard and sprayed gray paint all over the original color scheme, the original paint on the mast and booms was aluminum.

"Q. This No. 5 10-ton cargo boom and fittings was painted gray at that time?

"A. Yes, all the ship was painted gray.

[fol. 72] "Q. Why was the color scheme changed at that time to gray?

"A. On account of the war; it was right after Pearl Harbor.

"Q. And all the vessels were then painted the same color?

"A. That is right. We were at sea on our way in at the time of the war and they changed all the paint.

"Q. Will you tell us what was done with keeping the gear, particularly the block and tackle and gear on No. 5 10-ton boom—tell us what was done with reference to keeping that in condition.

"A. Well, that was in the same condition as the other gear. The topping lifts and falls were coated with what we call Shield's filler, and the blocks were regularly lubricated by the carpenter; they had alemite fittings on. On every voyage it was regular routine work to lubricate all the blocks and wires on the cargo gear.

"Q. Did you see that work being done?

"A. I did.

"Q. Did you know of your knowledge that it was done every voyage?

"A. Yes.

"Q. When is the last time that it was done prior to December 23, 1942?

"A. Well, it was done sometime in the previous voyage before arriving in New York.

"Q. About how many days or weeks, would you say, that was before December 23, 1942?

"A. Oh, about four weeks, I should say.

"Q. I believe you testified that you were on board this vessel when this accident to Sieracki happened?

"A. That is right. You mean with regard to this—this is off the record—

"Mr. Freedman: No, everything is on the record.

[fol. 73] "By Mr. Evans:

"Q. What was done on this vessel?

"A. On this vessel it is always regular routine.

• • • • • • • •

"Q. What part of the vessel were you in at the time of the accident?

"A. I was somewhere amidships either in my office or down in the dining salon.

"Q. What attracted your attention to the accident? How did you know it had happened?

"A. Well, somebody came forward in the passageway and said that No. 5 boom was just carried away."

• • • • • • • •

"Q. And what did you do?

"A. I immediately went aft on the starboard side of the deck to No. 5 hatch.

"Q. And what did you see with reference to Sieracki first?

"A. Well, I saw a number of men assisting one of the longshoremen of the ship, over on the port side of the ship.

"Q. How were they taking him off the ship?

"A. At the time I noticed him he said he hurt his arm and hand and they were, five or six of them, surrounding him and sort of had their arms around him somehow.

"Q. Was he on his feet, walking?

"A. When I saw him they had just taken him off this top of this resister house.

"Q. Did you also look at the gear that was involved at that time?

"A. I looked aloft and I saw the topping lift was off the head of the boom and had become unhooked and the blocks were about half way up the mast when I arrived.

[fol. 74] "Q. Did you see the shackle on the block on the end of the No. 5 10-ton cargo boom?

"A. I saw it along on the block at the time, but I didn't see the shackle until later after it had been taken down.

"Q. When you saw it up there did you observe whether or not it had broken?

"A. Well, I saw that the shackle was broken.

"Q. I show you a shackle, which has a tag on it marked 'Shackle, Robert Sherwood,' and ask you if that is the

shackle that was on the end of No. 5 10-ton cargo boom at the time?

"A. That is the same shackle. I looked at it after the Chief Officer and one of the riggers had gotten it down off the mast.

"Mr. Evans: I ask that that be marked Defendant's Exhibit 9. It is in three pieces.

"(The three pieces of the shackle referred to were marked as Defendant's Exhibit 9, for identification.)

"By Mr. Evans:

"Q. Now, on the occasion that this tackle was used prior to this accident, who rigged the tackle?

"A. The riggers from the Bethlehem Shipbuilding Company.

"Q. I mean just prior to the accident?

"A. Oh, prior to the accident, the longshoremen.

"Q. This is on December 23, 1942?

"A. Oh, the longshoremen rigged the gear."

Mr. Evans: That is all.

(Addressing the reporter) Is this the original? That is the one I offer.

The next one I have is quite long. I don't know how long Your Honor expects to be here.

The Court: You can go ahead with it. I will sit until half-past four anyhow. What is the next one.

[fol. 75] Mr. Evans: The next one is Pearlman.

May it please the Court, I offer the deposition of Harold Pearlman, a witness in the above-entitled action, taken on the 18th day of March, 1944, at the offices of Messrs. Cravath, Swaine and Moore, No. 15 Broad Street, New York, N. Y., at 2:20 o'clock in the afternoon, pursuant to oral stipulation.

Appearances:

For the Plaintiff: Messrs. Freedman and Goldstein, No. 1015 Chestnut Street, Philadelphia, Pennsylvania, by Abraham E. Freedman, Esq., of Counsel.

For Defendant Seas Shipping Company, Inc.: Messrs. Krusen, Evans & Shaw, No. 225 South 15th Street, Philadelphia, Pennsylvania, by T. E. Byrne, Jr., of Counsel.

For Bethlehem Sparrow's Point Shipyard, Inc.: Messrs. Evans, Bayard & Frick, No. 1335 Land Title Building, Philadelphia, Pennsylvania, by Philip Strubing, Esq., and Harold R. Medina, Jr., Esq., of Counsel.

(The deposition of Harold Pearlman was read by Mr. Evans and Mr. Byrne.)

[fol. 76] "HAROLD PEARLMAN, having been first duly sworn by Paul Fromm, a duly qualified Notary Public in and for the County of New York, State of New York, testified as follows:

Direct examination.

"By Mr. Byrne:

"Q. What is your full name?

"A. Harold Pearlman.

"Q. What is your address?

"A. Care of George G. Sharp, 30 Church Street, New York City.

"Q. What is your occupation, Mr. Pearlman?

"A. Engineer.

"Q. What is the business of George G. Sharp?

"A. Naval architect and consulting engineer.

"Q. Were you the representative of George G. Sharp at the construction of Hull No. 4350?

"A. Yes.

"Q. What was your position and that of George G. Sharp with reference to the United States Maritime Commission?

"A. I was resident inspector.

"Q. Has the firm of George Sharp been appointed by the United States Maritime Commission——"

Mr. Freedman: I didn't think that that was relevant in this proceeding, Your Honor. I don't know that it is important at all, but I didn't want to get involved into any details which didn't involve the particular case.

The Court: Well, if there is an objection, I will overrule it.

"Q. Did you act for the United States Maritime Commission at the construction of this hull?

"A. I assume so."

[fol. 77] "Q. What were your duties?"

. . . . . .

"Q. In connection with your duties, were you assigned as supervising inspector at the construction of Hull No. 4350?

"A. Yes.

"Q. Am I correct in stating that the specifications for the construction of this particular hull were prepared by the Sharp firm?

"A. Yes.

"Q. Do you have a copy of those specifications with you?

"A. I have.

"Q. Will you open it, with particular reference to the ten-ton lifting boom at No. 5 Hatch?

"A. Yes, sir.

"Q. Am I correct in saying that there were a number of five-ton capacity ordinary cargo booms on this ship?

"A. Yes.

"Q. Am I correct also in stating that there were two booms of a heavier capacity, one a thirty-ton boom and one a ten-ton boom?

"A. Yes.

"Q. Do you recall the location of the ten-ton boom?

"A. The after side of the main mast.

"Q. What hatch would that service?

"A. No. 5 Hatch.

"Q. Are these the specifications for Hull No. 4350, which are contained in one volume?

"A. Yes, sir.

"Mr. Byrne: I offer that for identification."

. . . . . .

"Q. Mr. Pearlman, I refer you to page H-42 in Defendant's Exhibit 1 for Identification. In the center of the page there is the heading 'ten-ton boom,' is that correct?

[fol. 78] "A. That is right.

"Q. Which line contains the specifications with reference to the topping lift block boom end of the ten-ton boom?

"A. Line 'J.'

"Q. I refer you to page H-43 of Defendant's Exhibit 1 and ask you if the center drawing and specifications there shown refer to the ten-ton boom on this particular hull.

"A. No, this is purely diagrammatic.

"Q. Are they the specifications for the ten-ton boom in this hull?

"A. Yes."

. . . . . .

"Q. On page H-42, under the heading 'Figure No.', I ask you what figure number is shown in Line J?

"A. Figure No. 4588."

. . . . . .

A. W. GROSVENOR, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Evans:

Q. Mr. Grosvenor, what is your profession?

A. I am a metallurgical engineer, associate professor of mechanical engineering, Drexel Institute.

Q. Will you state your qualifications. From what institutions have you graduated and what degrees do you hold from those institutions?

A. Graduated from Ohio State University in Metallurgical Engineering, Degree of Bachelor of Science in Metallurgical Engineering. I have taken two graduate courses, without degree, at the University of Pennsylvania, Science of Metals and Stress Analysis. I have taught at Drexel Institute for fourteen years, teaching Metallurgy.

[fol. 79] Prior to coming to Drexel, I was chief metallurgist for Laclede Steel Company, St. Louis, manufacturers of steel. During the past ten years, concurrently with my teaching at Drexel, I have been doing consulting work in metallurgy.

Q. Your consulting work has been for various firms who have employed your services, not for any particular firm?

A. Not for any particular firm, that is right, for various firms.

Q. I show you a shackle which is marked Defendant's Exhibit 9 and ask you if you made an examination of that shackle at my request?

A. I did.

Q. Can you tell me when and where you made that examination?

A. I examined it in my own laboratory. At the moment I can't give you the exact date. It was some weeks ago. I also re-examined it in your office last Saturday.

Q. Will you tell us what your findings were?

A. The shackle was brought to me in this condition, fractured. I made a very careful and thorough examination of the surface of it by eye, by magnifying glass, and then by microscope up to thirty magnification on both the original exterior surface of the shackle and on the fractured parts. The purpose of the examination was to see if it could be learned from such observation the cause of fracture. The only deduction that could be made was that there was an internal flaw in the steel, a defect of some sort, that is evident on the fractured end. Aside from that, the fact that there is an internal flaw, no other deduction could be made as to the cause of failure.

Q. When you speak of an internal flaw, you are referring to that little hole in the center of the shackle?

Mr. Freedman: Wait just a moment, pleasy. I think it is too leading. I think he ought to describe what he does mean. [fol. 80] The Court: I guess that is right.

By The Court:

Q. What do you refer to as an internal flaw?

A. In the broken end there is a small hole approximately in the center. That hole is about three-eighths of an inch wide, three-eighths of an inch in one direction, and an eighth of an inch in the other, the sort of flaw that we commonly call a pipe.

By Mr. Evans:

Q. That was the purpose of my question. I wanted to connect the testimony up with the former testimony. That is what you call a pipe, isn't it?

A. That is what it is called, yes.

Q. Can you tell us how and when that pipe got into the metal?

A. No, sir. I can simply say this, that a pipe, strictly speaking, is a shrinkage cavity that forms in the steel when it first solidifies. Steel of that sort is first cast into the

form of a large rough block, and after it is solidified, it then can be rolled, forged, or pressed out to the desired shape.

In the upper part of an ingot there always is a shrinkage cavity. One of the objects upon rolling or forging the ingot is to cut off ultimately all of the pipe or defective section near the top so that it is entirely removed and does not appear in the finished product. Sometimes the pipe isn't a continuous cavity. It is generally originally a funnel shaped cavity near the top of the ingot and extending down some distance. Sometimes, however, the pipe isn't continuous; there will be a short interval of sound metal and then one or more small cavities below that, so that when the ingot is sheared to remove or cut off the pipe portion, it sometimes happens that the cut goes through one of those sound portions called a bridge, so that on the end it appears to be perfectly sound and the remainder then of the ingot is rolled or forged and assumed to be sound.

[fol. 81] Q. So this pipe got into that shackle either at the time the ingot from which it was made was made or at the time the shackle was forged?

Mr. Freedman: I don't think he said that, Your Honor.

The Court: He said a pipe is a shrinkage cavity which forms in the steel when it first solidifies. That is what he said. Now, I don't know how far you want to develop that.

Mr. Evans: Then he also said that when they are using this rough bar that they get and put it in the shape, that they try to eliminate those pipes, but one might not be eliminated.

By Mr. Evans:

Q. Is that correct?

A. That is correct.

Q. If you happen to cut it where it is solid and there is no pipe, there would be no way of knowing that there was a pipe in there below the cut, would there?

A. Well, I wouldn't say there is no way of knowing. It is not visible.

Q. Can you tell us from looking at that shackle how it was made? After you have this ingot, this bar—I will call it raw steel—will you describe the process of manufacture from the ingot into what you see there?

A. Well, after the ingot has been rolled, forged, or pressed down hot to a somewhat smaller size, it is then cut into suitable lengths; and for a product of this sort, which is forged, it might be made by one of several modifications, slightly different methods, but the sum and substance of it is by any method it would be pressed or hammered while hot into the shape of that shackle.

It appears from the mark around the eye of the shackle that it was first hammered or pressed on the end so as to thicken the part; then it was placed between dies and hammered or pressed to produce the rounded shape. In my [fol. 82] opinion, it was made by that method, by what is known as a closed die or drop-forging method. In all probability the thing was made as a straight piece; the two ends were forged; and then, while hot, was bent to the final U shape.

Q. Can you tell us from your examination of that shackle when the forging process was complete, that is, when it was in the shape that you now see it, whether that pipe would show on the surface of the shackle?

A. I found no evidence in my examination under the microscope that that pipe extended to the surface.

Q. Yesterday a witness, Mr. Money—I believe you know Mr. Money, don't you?

A. Yes, sir.

Q. —pointed to what he called a lump on the outside of the bow of the shackle on both halves, and he testified that in his opinion—(addressing the jury)—I am pointing to the same thing that Mr. Money did yesterday—that in his opinion that was metal which, in the process of manufacturing that shackle, was added to cover a defect.

Mr. Freedman: I don't know whether he said in the process of manufacturing. I think that if the question were put without which process it was done——

Mr. Evans: Mr. Freedman, so that there will be no question about it, I will read you his testimony.

Mr. Freedman: That is fine.

Mr. Evans: Page 103. Mr. Freedman asked the question:

"Q. Will you explain that for the record? When you say 'here' you mean at the top of the shackle in the center of the U?

A. That would be sufficiently descriptive. In my opinion, this has been doctored for the purpose of concealing

the crack, as evidenced by the raised layer of material at the crown of the shackle, as evidenced by a hump on the other piece, which, in my opinion, shows evidence of peening, and at the end of this hump is a characteristic tri-
[fol. 83] angular mark which, in my opinion, is evidence of the application of an acetylene torch."

By Mr. Evans:

Q. Now I ask you to examine that shackle, with Mr. Money's testimony in mind, and ask you your opinion.

A. Well, I observe a series of somewhat flattened areas, slight ridges, depressions, not only at that point, but fairly well all over the thing. I don't see anything different about that point on the shackle, particularly, so far as bumps or flats or depressions or elevations any more than on the rest of the shackle. Obviously, now, the galvanizing is shiny there and the paint is knocked off some place, which makes that place look somewhat different, and seeing a defect there, naturally, my eye is led to that point; but if I merely look at it as a series of bumps and flats and things of that sort, there are a number of points over the shackle, bumps that are just as pronounced. There is one down here half way between the fracture and the eye that is much bigger than that.

Q. Do those bumps suggest to your mind that the shackle has been doctored?

A. No, sir.

Q. What do they suggest to your mind? How do you account for their presence?

A. Well, until I heard Mr. Money's testimony as to the cause I simply assumed that they were from the forging, because they appear all over it, and having heard Mr. Money's testimony, I still see no evidence, having looked at it with that idea suggested to me, I see no evidence of those bumps indicating any—what did you call it—doctoring—any attempt to cover up something.

Q. Do you see any evidence there of the use of an acetylene torch?

A. No, sir.

By the Court:

Q. Mr. Money said that a metallurgical miscroscopic examination would disclose whether or not there had

[fol. 84] been added material there by acetylene torch or otherwise. Do you agree with that?

A. Oh, yes, that is right. It could be determined very easily by cutting sections, through polishing the sections, and examining them at a hundred or more magnification under a microscope. That could be determined.

Q. Would that be an expensive or a long examination?

A. It would take, after the piece is sawed open, it would take approximately twenty minutes to polish a sample and five minutes to examine it.

Q. That could be done over night very easily?

A. Yes, sir.

The Court: It might be worthwhile doing. Both witnesses agree that that would disclose the situation.

Mr. Evans: We will be very glad to have that done. I assume you will agree, Mr. Freedman.

Mr. Freedman: Very much so, I certainly would.

The Court: Let us see whether it is necessary or not. I didn't know it was such a simple matter.

Mr. Evans: You see, we didn't do it now, because we didn't want to destroy any part of this shackle before it was before the jury; otherwise, it would have been done before.

The Court: That is right.

By Mr. Evans:

Q. When you examined the broken surfaces of each half of this shackle, did you observe any evidence of galvanizing inside of the break?

A. No, sir.

Q. Or any evidence of paint being inside of that crack or fracture?

A. I did not.

Q. Did you observe any evidence whatsoever which would suggest to you that the crack extended to the surface before the actual fracture?

[fol. 85] A. I find no evidence of that at all.

Q. If you had seen that shackle at the time it was galvanized, is there anything that you see now that would have suggested to you that that shackle was defective?

Mr. Freedman: I object to that, sir. I think it is certainly something not based on the facts—if he had seen it before it was galvanized.

Mr. Evans: Mr. Money testified if he had seen it then he would have known what it was.

The Witness: What was the question?

(The reporter read as follows):

"Q. If you had seen that shackle at the time it was galvanized, is there anything that you see now that would have suggested to you that that shackle was defective?"

The Court: Put it this way. I don't know what you mean by "at the time." If you had seen it before it was galvanized, is there anything there that would have suggested to you that it was a defective shackle?

A. Well, I can't answer that too positively. I will say this, if I understand the question, that there is nothing on that shackle now that I can see that would indicate a type of defect that would have shown up before it was galvanized. Does that answer your question?

The Court: Yes.

By Mr. Evans:

Q. Of course, after it was galvanized, that wouldn't have helped bring out the defect, would it, galvanizing?

A. No, sir.

Q. And painting after the galvanizing would not have made the defect any more apparent, would it?

A. No, sir.

Q. And it is your opinion that that shackle from the time it was galavnized—we need only go back that far—what [fol. 86] is your opinion, after that shackle was galvanized, with reference to showing any defect that a careful examination by an experienced person would notice?

A. I have found nothing that would indicate any defect which was visible after the shackle was galvanized, and I may say I find nothing that would indicate a defect that was visible before galvanizing. I can't, of course, say whether or not such a defect was visible, but I find nothing now that would indicate any defect before or after galvanizing.

By the Court:

Q. May I ask you a question? An X-ray would show up the defect, wouldn't it?

A. In all probability an X-ray would show a pipe.

Q. Is an X-ray inspection a common thing today?

A. For pressure vessels, that is, boilers, things where the failure would cause a terrific explosion, things of that sort, where the utmost precaution must be taken and where no expense is spared, then X-ray would be taken. It is not customary to make X-rays of a thing like this for routine inspection.

By Mr. Evans:

Q. What about the sound test, tapping shackles? Can you tell accurately from that whether they have a pipe in there?

A. Well, under what conditions is the shackle at the time you want to make the sound test?

By the Court:

Q. Well, suppose the shackle were just in your hands going to be assembled. It hasn't been assembled. Could you tell by hanging it up and giving it a tap? Would the sound indicate anything to you?

A. If the pipe were very large and extensive, it might indicate something. However, I can't say, because such a test isn't at all common for that type of thing.

[fol. 87] Q. Do you think that a pipe of this size would make itself evident by the timbre of the note that it would give off?

A. From what I can see of the size of the pipe here, about one-eighth by three eighths, I doubt if it would affect the tone enough to make much difference.

I can't claim much experience on sound testing or things of that sort because it just isn't a common practice. It isn't the sort of thing you train yourself for.

Mr. Freedman: I move that his testimony be stricken, Your Honor, with respect to the sound test.

The Court: Why?

Mr. Freedman: Because he says he can't claim enough experience on the sound test.

The Court: That doesn't make it incompetent. Do you feel competent to give the opinion that you have just stated? That is the only question.

By the Court:

Q. Have you had any experience at all with sound tests?
A. No, I haven't, Your Honor; it isn't a common test.

The Court: I will strike out his testimony.

The Witness: Your Honor, the main point I was making is that the sound test, by and large, is not a common test.

The Court: I understand, but I mean your thought that it might or might not show up on a sound test, that I will strike out, because you never made any yourself.

The Witness: I beg your pardon. I didn't say I have not made any; I say I haven't made enough to test that dimension.

The Court: But the statement that a sound test is not a usual or common test, I will allow that to stand.

[fol. 88] By Mr. Evans:

Q. If that shackle were fastened to a block or pulley and then the shackle or block or pulley fastened to the end of a boom on a vessel, could you give it a sound test then? Would a sound test prove anything under those conditions?
A. I don't believe it would.

Mr. Freedman: I object to that, sir. He says he doesn't have any experience and he wouldn't know.

The Witness: May it please Your Honor, I didn't say I didn't have any experience. If it please Your Honor, may I qualify—whether it goes on the record or not—what I said? I said I hadn't had enough experience in sound test to say whether a defect of a certain dimension would make a difference in sound. I didn't say I never had made any sound test. We have even gone so far at times as to use a stethoscope trying to see whether or not we could use a sound test, but I can't say that I have had enough experience to say whether a defect of a certain size—that was the point I made. I didn't say I was inexperienced with sound tests.

The Court: The question is now: After the shackle was fixed in place or attached to the tackle, would a sound test, in your judgment, indicate anything at all?

Mr. Freedman: There I object, sir, because if he doesn't have enough experience to determine whether a certain defect would be manifest on the sound test, it wouldn't

make any difference whether it was suspended by the hand or boom or somewhere else.

The Court: I am asking a broader question than that. The question I am asking him is for any kind of a cavity. He obviously has enough experience to answer that question.

The Witness: In my opinion, when that is attached to the pulley and the boom, those things alone would make such [fol. 89] a deadening effect that the sound test would have no particular value.

By Mr. Evans:

Q. Will you give us your opinion as to the cause of this so-called lump of metal on the outside of the bow of the shackle? When you bend a shackle it would tend to thin out there, would it not?

A. Yes, sir.

Q. All right. Now, will you give us your opinion as to what caused that little lump of metal there that Mr. Money referred to?

A. In my opinion, the shackle was made straight, as a straight bar with eyes on the end, heated in the center portion and then bent to the shape of a U, and obviously some pressure has to be exerted, whether it be by hammering or pressing, in order to bend a thing of that size to a U shape, and it is certainly conceivable that those lumps could have been produced in that way. There are marks all over the bar from forging or hammering, and I see nothing there that could not have been produced in the same way.

Q. When a shackle is bent or when the piece of steel is bent in the shape of a shackle, is any allowance made for the thinning that the bend would cause?

A. When a bar of metal is bent, it thins, due to the bending, the stretching of the metal on the outside, and it thins down somewhat. Where it is desired to prevent that or to compensate for it, the bar must be first thickened up in the middle. That is, it is upset, as the blacksmith calls it, to thicken the bar somewhat at that point; then it is bent and the bar then forged down to the proper dimensions. That may have been done in this case. It is impossible to say, but it may have been done. It seems to be quite uniform in cross-section now.

Mr. Evans: Cross-examine.

Mr. Freedman: No questions.

[fol. 90] The Court: That is all.

Mr. Strubing: I have some questions on behalf of the Bethlehem Sparrow's Point Shipyard.

Cross-examination.

By Mr. Strubing:

Q. Mr. Grosvenor, this pipe, as I understand it, is a hole in approximately the center of the bar of metal; is that correct?

A. Yes, sir.

Q. And when you say it is approximately three-eighths of an inch in one diameter, which diameter is that?

A. That is parallel to the U.

Q. Can we call that then three-eighths of an inch long?

A. Well, I think your term is better. On the diameter it is three-eighths of an inch. If I said it is long, it might be interpreted as running lengthwise of the bar. I don't mean that. I don't know how far back it goes.

Q. You can't tell how far back it goes?

A. No, sir.

Q. Can you tell any minimum distance how far it goes?

Mr. Freedman: I object to that. If he can't tell, he can't tell maximum or minimum.

The Court: He can tell that it certainly runs so far and he doesn't know how much farther. That is all he is asking him.

Mr. Freedman: I will withdraw the objection, sir.

A. All I can say here is about an eighth of an inch deep.

By Mr. Strubing:

Q. Is there any evidence of a crack extending from that pipe in any direction?

A. Yes, there is some sort of a slippage or crack extending from that pipe, mostly in one direction, mostly toward the outer part of the crown of the shackle.

Q. What does that crack indicate to you?

A. From what I can see, in my opinion, it is an extension [fol. 91] of the flaw or pipe which was caused when the shackle was loaded.

By Mr. Freedman:

Q. What was that? I didn't get it.

A. When the shackle was loaded, under load, after the shackle was made. In my opinion, the crack started to develop from the pipe in the same general direction as the long dimension of the pipe.

By Mr. Strubing:

Q. Is that the line along which the shackle finally broke?

A. No, sir, the shackle broke crosswise.

Q. Do you have an opinion as to how wide that crack is as compared with the width or length or depth of the pipe?

A. Well, a crack of that sort can have practically no width. That is, the two faces can be tight together, still no bond across it, no strength across it.

Q. I am talking about the other dimension. I don't mean the metal was separated, but was the crack wide or was it just a line?

A. I see no evidence of anything other than a line. The thing which indicates the narrowness of the crack is the smoothness of it, as though the parts in slipping had rubbed over each other.

Q. And as I understand it, it is your opinion, based on your examination by the naked eye and under a magnifying glass and under a 30-power microscope, that there was no evidence on the surface of the shackle of the existence of either the pipe or the crack prior to the time the shackle broke?

A. I find no evidence of any defect on the surface.

Q. Now, when this piece of metal was bent into a U, it was either hammered or pressed, was it not?

A. Yes, sir.

Q. And that was done while the metal was hot?

[fol. 92] A. Yes, sir.

Q. What is the ordinary temperature used for that bending?

A. About 1800 degrees Fahrenheit.

Q. And is that metal soft or hard under that temperature?

A. It is soft.

Q. Can you tell whether this was hammered or pressed in order to turn it into a U?

A. Not for certainty, but there are marks over the bar which would indicate hammering.

Q. And would such hammering make dents and other marks and humps on the bar as it was being bent?

A. It was on the basis of those marks that I base my opinion that it was hammered.

Q. Are those marks the kind of marks that are usually found on shackles that are hammered to a U?

A. Yes, sir.

Q. Is there anything unusual about those marks for a drop-forged shackle?

A. I find none.

Q. Do you know under what circumstances the sound or bell test is used on forged shackles?

A. As I stated before, in my experience with the manufacture of steel and particularly forgings, I have not come across anyone who uses that test.

Q. As a general practice?

A. As a general practice, in the forge shop or in the steel mill.

Q. Suppose, however, that there is some reason to suspect a certain piece of metal in the forging shop or after it is forged, is the bell or sound test used under those circumstances?

A. It might be. I have never run across it. The only case I can cite is——

Mr. Freedman: Just a moment.

The Court: All right.

[fol. 93] Mr. Freedman: I object to that.

By Mr. Strubing:

Q. To your knowledge, is that test ever used by shipyards who purchase shackles and blocks for installation on vessels?

Mr. Freedman: I object, Your Honor.

The Court: Oh, it is all right. I will overrule the objection.

A. I have no knowledge of such tests being used.

By Mr. Strubing:

Q. Do you have knowledge of the practice of shipyards with regard to the purchase and installation of shackles such as this?

A. No, sir.

Q. You said that the sound test, in your opinion, would be of little value when the shackle was attached to the block and to the boom?

A. That is right.

Q. Suppose it was attached only to the block, would it still be of little value?

Mr. Freedman; Now, just a minute. Don't——

Mr. Strubing: I am cross-examining.

Mr. Freedman: You are a defendant. I don't know whether, strictly speaking, he has the right to cross-examine to the same extent the plaintiff has.

The Court: Oh, I think so.

Mr. Freedman: All right.

A. Even there to some extent the sound would be muffled or other vibration would be set up. The only way to test it would be to hang it or support it from a knife edge or wire, something that would not absorb the vibration.

By Mr. Strubing:

Q. And is it necessary, in order to make the sound test effective, to have a wide experience in making such test? [fol. 94] A. I should say that one would have to have a considerable amount of practice, not only on making sound tests——

Mr. Freedman: If the Court please, I object to that. That is a question of fact for the jury to find from the evidence. I don't think it is his function to state how much experience is necessary.

The Court: I will overrule the objection.

Mr. Strubing: I am trying to help the jury find that.

The Witness: I would say that one would have to have not only experience in sound testing, but would have to be familiar with that particular shape of thing.

The Court: All right.

OCTAVIUS NARBETH, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Evans:

Q. Mr. Narbeth, what is your profession?

A. I am a Naval Architect, Marine Surveyor.

Q. Will you state what experience you have had in those particular professions?

A. For 34 years I was a surveyor to Lloyd's Register of Shipping, and for the first three years and a half of that period I was stationed at the Steel Works, studying the manufacture of steel and iron and inspecting the manufacture of steel and iron. After that period I was engaged in inspecting the building of ships and the inspection of materials, all kinds of materials that go into ships. I am now retired. Before I retired I was a member of the Institution of Naval Architects and Marine Engineers of New York.

Q. Mr. Narbeth, at my request did you examine that shackle which is before you, marked Defendant's Exhibit 9?

[fol. 95] A. Yes.

Q. Where did you examine that?

A. At your office.

Q. What did you have with you or what did you use, what instruments did you use, at the time of the examination?

A. I didn't use a microscope or any other instrument except my own eyes and my glasses that I usually wear.

Q. Can you tell us your findings as a result of that examination?

A. I found that there was a defect in the center of the section which is broken, a defect which is known among steel manufacturers as a pipe. This pipe extended out nearly to the surface.

Q. In your experience you have briefly reviewed for us did you have anything to do with the manufacture and inspection of shackles such as that?

A. It has been my duty to see shackles such as this in the process of manufacture, and when they have been finished, it has been my duty to test them in a testing machine and to examine them to see if they were well made and reliable.

Q. Have you had any experience with reference to the building of vessels while there in the shipyard and the shackle and gear was being installed?

A. Yes.

Q. What experience have you had in that regard?

A. Well, I have seen many hundreds of ships built during my experience and watched the masts being erected and the booms placed in position and the cargo gear put in position and tested.

Q. In what capacity did you see all this done? What were you doing there at the time?

A. I was surveyor to Lloyd's Register—in order to see that the vessel when completed would be entitled to a certificate of class.

Q. Will you tell us from your examination of that shackle whether, in your opinion, any defect showed on the surface [fol. 96] of the shackle at the time it was installed in the vessel?

A. I have examined this shackle as it is at the present time, and I am confident that no one but an expert could have seen any defect whatever in the shackle, and I am very doubtful at all if any expert could have seen any defect in the shackle viewed from the surface.

Q. Is there anything there that you think an expert might have seen? What do you see there?

A. I don't see anything to indicate that the defect was visible on the surface in any shape or form.

Q. What about the bell or ringing test, is that made on board ships on all steel that goes into the ship?

A. The ringing test is not made generally on shackles or anything else, except this way, that these shackles, a man working on a shipyard who is going to install a shackle of this kind and place, if he throws it down on the deck and it rings like a cracked bell, you would become suspicious immediately and look for this, but I have never known anyone to make a practice of ringing a shackle or other appliance as a test.

The Court: Why not?

A. Because it is taken for granted that these appliances having been tested in the testing room, that they are sufficient, that they are thoroughly reliable and are not in need of any further test.

Q. You are speaking of the point at which they are actually installed on the ship, are you?

A. Yes.

Q. Then it follows, does it, from what you said that at that point, the actual time of installation on the mast, they are not tested at all?

A. After the gear is all rigged, then they are tested by lifting a load.

Q. But I mean the separate pieces of the gear are not tested?

[fol. 97] A. Oh, no; no, sir.

Q. It is never done?

A. No.

By Mr. Evans:

Q. After the vessel is delivered and in operation, do they ever make any sound tests of any of the equipment that is used in the vessel?

A. No.

Mr. Freedman: I object to that, sir. It is what they should have done, not what they actually do do.

The Court: Well, you have to determine what is reasonable from what the practice is, I should think. I think it is all right. I think I will have to have some knowledge of the practice.

Mr. Freedman: I will withdraw it. I withdraw my objection.

The Court: Yes, I don't see how I could ever sit here very well without ever having seen a ship built and say what ought to be done, without any knowledge whatever. I can't just rule in a vacuum, so it is all right.

By Mr. Evans:

Q. When a vessel is completed, delivered, I don't suppose that you or anyone can tell us how many thousand of pieces of steel have gone into that vessel, can you?

A. I don't quite understand.

The Court: It is just an argument. I don't think you need bother with it.

Mr. Evans: I want to test the practicability. If you were going to test this, test every piece, you would have to take the whole ship apart.

The Court: I say, it is an argument.

Mr. Evans: Cross-examine.

[fol. 98] Cross-examination.

By Mr. Freedman:

Q. I assume you inspect all other parts of the vessel as well, too, Mr. Narbeth?

A. Yes.

Q. And you likewise rely on the people who furnish the equipment to have performed the proper tests. I assume that to be a fact too; is that right?

A. We rely upon them, yes.

Q. And you make no independent tests of your own to determine whether there are any defects?

A. Well——

Q. Outside, of course, of just performing a lifting test.

A. That is true to a certain extent, but not absolutely, because a surveyor to Lloyd's Register is on the lookout for defects in any part of the ship or structure at any time, and it is quite possible under the most stringent conditions for slight defects to pass through without being discovered, and the surveyor to Lloyd's Register, when he is inspecting the building of a ship, is on the lookout at all times for defects that might have passed other inspectors.

By the Court:

Q. I wonder if you could make it clear as to just whose interests are being served when you make your inspection for Lloyd's. Is it the interest of the purchaser of the ship or the owner of the ship?

A. When Lloyd's surveyor has finished inspection of the ship, the committee of Lloyd's Register give to the ship a certificate of class, and if that cerificate is of their highest class, then it is handed to the ship owner, and by using this certificate he can obtain the lowest rate of insurance.

Q. So it really is, of course, primarily for the insurer, but indirectly for the benefit of the owner of the ship?

A. Primarily for the owner of the ship, and afterwards he uses it in order to obtain his lowest rate of insurance.

[fol. 99] Q. That inspection that you make, the ship is always completed when you make the inspecion?

A. We carry on our inspection every day that the ship is being built.

Mr. Freedman: I have no further questions.

By Mr. Strubing:

Q. Mr. Narbeth, are you familiar with W. H. McMillan's Sons, New York?

A. No, I can't say that I am.

Q. Do you know anything about them?

A. McMillan's?

Q. W. H. McMillan's Sons.

A. No, I don't know them.

Q. Manufacturers of tackle blocks.

A. I know them as a firm. I have seen their catalog, but I am not acquainted with their works or intimately associated with them in any way.

Q. Do you know whether they are reputable manufacturers or suppliers of ship fittings?

A. Oh, yes.

Q. Well known in the trade?

A. Well known in the trade.

Mr. Freedman: I object to that, sir. I don't know that that is competent.

The Court: Well, I think it would be presumed unless there is something to the contrary shown. I don't know that it is necessary, but it is all right. I will let it stand.

By Mr. Strubing:

Q. You spoke of tests being made in the testing room. Were you speaking of the testing room of the manufacturer there?

A. The manufacturer, yes.

Q. You were not speaking of any tests made of shackles in the testing room of shipyards?

[fol. 100] A. In the works where the shackles and other things are made.

Mr. Strubing: That is all.

SAMUEL S. MORSE, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Evans:

Q. Mr. Morse, what is your profession?

A. Naval architect and marine engineer.

Q. What has been your experience and what are your qualifications?

A. I hold a degree in naval architecture and marine engineering, and I have taken post graduate courses in engineering subjects over and above that in structural engineering and cement engineering—concrete. I spent eight years with the United Fruit Company in their operations and design as a research engineer, and I came with Cramp's Shipbuilding Company three years ago as chief of the scientific section, where we have a large naval program, also a repair program, and in that capacity I was in charge of the testing in the yard, including trials and tests; and the last year I have been naval architect in the Shipyard.

Q. During the last year you have been naval architect at Cramp's Shipyard.

A. Yes, sir. As naval architect I approve all the plans, such as plans that this was put on the ship from.

Q. As a naval architect you draw plans and specifications for vessels, do you not?

A. Yes, sir.

Q. You approve of the gear, blocks, tackle, boilers, and a thousand other things that go into a vessel?

A. Only the hull items. That does not include the boilers.

[fol. 101] Q. Just the hull; the mast, the tackle, winches, hatches, hatch covers——

Mr. Freedman: Wait a minute. The hull is entirely removed from the mast and the winches.

The Witness: No, actually it isn't. The hull includes the rigging.

The Court: I didn't hear that.

The Witness: The hull includes the rigging. The word "hull" there differentiates between hull and machinery items.

By the Court:

Q. Does the mast or the boom and tackle come under your department?

A. Yes, sir.

By Mr. Evans:

Q. Have you ever heard of McMillan blocks?

A. Yes, sir.

Q. You have heard of the McMillan Company who manufacture blocks and tackle for vessels?

A. They are one of a number of competitive outfits.

Q. Sir?

A. They are one of a number in the field.

Q. What is their reputation in the field?

A. There is no outstanding firm. I think they are all about the same. All the equipment you buy is subject to Classification Society and governmental tests.

Q. Are McMillan tackle blocks specified as much as any other for vessels?

A. Yes, sir.

Q. Cargo gear on vessels?

A. Yes, sir.

Q. The McMillan block comes with the block and shackle attached, does it?

A. Bought separate or with the block.

Q. It depends on what you specify?

[fol. 102] A. The plan I saw that this was built from that you have in your office——

Mr. Strubing: I object to that. I haven't seen what plan he has seen.

The Court: It will be developed.

By Mr. Evans:

Q. Did you examine that shackle which is before you, Defendant's Exhibit 9?

A. Yes, sir.

Q. Can you tell us where and when you examined it?

A. Either the first or second Tuesday in April, and then again last Saturday.

Q. Will you tell us your findings as a result of that examination?

A. The first thing I was interested in is the use of the block, and I found that from the size, I would expect this

to break at about a 50-ton load, and the application of a 10-ton load would be a factor of safety of five. The shackle itself is a forging. No one has given me any analysis of the material. The type of break indicates that it is mild steel. Chemical analysis would reveal just what percentage of carbon and alloys might be present, but it is a mild steel forging, and the defect in the center is plainly visible. You don't need a microscope to see that.

Q. It is plainly visible now that the shackle is in two pieces?

A. It is plainly visible now, yes, sir.

Q. Was that defect visible, in your opinion, before the shackle was fractured?

Mr. Freedman: I object to that, sir.

The Court: Why?

Mr. Freedman: I don't know whether he is qualified as a metallurgist, sir.

The Court: Well, go ahead and qualify him if you want to

[fol. 103] Mr. Evans: He is a naval architect, if Your Honor please.

Mr. Freedman: That includes drafting and other kindred matters, but it does not involve the construction of metal parts.

By the Court:

Q. What do you do as a naval architect? Tell us all the things you do. Does it have any relation with the shackle on the ship?

A. As chief of the scientific section, I was in charge of a group of fifteen graduate engineers who performed all tests on the vessels, including surface inspection of these; tests with overload; examination after the overload test; and reporting the findings to the Government.

Q. That was all under your supervision?

A. Yes, sir.

The Court: I think he is qualified.

Mr. Freedman: I object to it, Your Honor.

Mr. Strubing: I would like to ask Mr. Freedman whether it is his idea that the test here in this case is whether this was discoverable by a metallurgist.

Mr. Freedman: Do you want to put me on the stand?

Mr. Strubing: No, I would like you to state your position.

Mr. Freedman: I don't think I need to now. I don't even know what you are referring to.

The Court: Well, he is referring to a point that has to come up pretty soon.

Mr. Freedman: It never even occurred to me, Your Honor. If he wants to put me on the stand, if he thinks I am a metallurgist——

The Court: No, he doesn't want to put you on the stand.

[fol. 104] By Mr. Evans:

Q. Can you tell us whether, in your opinion, the defect in that shackle showed on the surface prior to the time of fracture?

Mr. Freedman: Your Honor has my objection, sir. That is subject to my objection.

The Court: Yes. I think he is qualified to do that.

By the Court:

Q. Have you personally examined shackles of this kind, tested them?

A. Yes, sir, including pulling them apart.

Q. What?

A. Including the destructive testing of them in the laboratory.

Q. This kind?

A. Bigger and smaller, yes, sir.

The Court: I think he is qualified.

By the Court:

Q. Go ahead and tell us whether in your opinion you think, after examination of that break and the surrounding parts of the shackle, that that was a defect which was visible on the surface before the break?

A. Starting from the outside in, the first thing that part of the shackle has on it is paint, and that is partly worn out on the outer surface.

Q. Let us start out by assuming that the shackle wasn't painted. Let us start with a galvanized shackle.

A. Actually, it was, but starting with the galvanizing, the galvanizing is torn all around. That indicates that it broke under loading; and the galvanizing goes on as a

fluid, molten metal, and would flow into any cracks and make a coating quite a bit like paint. Now, if that flowed around the corners of this crack, there would be rounded edges, and all these edges have very sharp cracks where there is no evidence of damage, particularly the point at [fol. 105] the top of this pipe. I looked at it with the greatest interest, because if this had extended out, that would have rounded edges, and they are very sharp. Even now after all the handling, there is a very sharp tear in the galvanizing indicating that that broke under loading and wasn't cast with any crack in it.

Q. In other words, your opinion is that the crack does not extend to the surface?

A. Yes, sir. If the crack had extended to the surface, the galvanizing would have a depression, because it is only a coating.

Mr. Evans: That is all. Cross-examine.

Mr. Freedman: No questions.

Mr. Strubing: No questions.

Evidence of Third Party Defendant

Discussion

Mr. Strubing: If your Honor Please, first I will offer in evidence letter dated July 16, 1941, on the letterhead of George G. Sharp, addressed to United States Maritime Commission, which constitutes, as has been already identified in Mr. Freedman's case, the completion certificate covering this vessel.

Mr. Evans: If your Honor please, I rested, but I forgot for the moment that we are going to have this test made of the shackle.

The Court: Did you hold it?

Mr. Evans: Did you not want us to do it? We are very happy to do it.

The Court: If we are going to do it we will permit that to go in later as part of the case.

Mr. Freedman: Mr. Strubing is now offering a letter, to which I object. I think the best evidence should come from the mouths of the witnesses who testified as to that there.

[fol. 106] The Court: I understand that you do not object to the authenticity of the letter, or to Mr. Strubing's state-

ment that it was written by the person who is purported to have written it.

Mr. Freedman: I do not object to that.

The Court: In that case I will overrule the objection.

(Photostat of document described as "Completion Certificate, dated July 16, 1941," was marked Third Party Defendant's Exhibit 1.)

Mr. Strubing: If your Honor please, I would like to offer in evidence deposition of Mr. Pearlman, a very short part of that. I wonder if Mr. Byrne would help me out.

I will start with page 31.

The Court: All right.

Mr. Strubing: On page 31, "By Mr. Strubing."

Mr. Freedman: On what page, please?

Mr. Strubing: Page 31.

(The deposition of Harold Pearlman was read as follows):

"Q. Mr. Pearlman, by whom are you employed?

A. George G. Sharp.

Q. Were you employed by that firm in 1939, 1940 and 1941?

A. Yes, sir.

Q. What connection did you have with the construction of Hull No. 4350?

A. Resident inspector.

Q. As such, were you familiar with the specifications for that hull?

A. Yes."

The Court: Now, Mr. Pearlman is the Naval Architect?

[fol. 107] Mr. Strubing: Yes, sir.

The Court: He was acting for whom?

Mr. Strubing: For the Maritime Commission.

The Court: Employed by the Maritime Commission?

Mr. Strubing: Yes, sir.

The Court: All right.

(The reading of the deposition continues as follows):

"Q. Are those specifications the volume which has already been identified as Defendant's Exhibit No. 1?

A. Yes."

Mr. Strubing: I will skip some questions down to the middle of page 33, starting "The Register of cargo gear"

(The reading of the deposition continues as follows):

"Q. The Register of cargo gear which has been marked as Defendant's Exhibit 8, applies to Hull No. 4350; does it not?

A. Yes.

Q. And the certificate on page 1 was signed by you, among other persons?

A. It was.

Q. For what purpose or for what reason did you sign that certificate?

A. That is part of the requirements of the job.

Q. In other words, am I correct in saying that you did that in the course of your duties?

A. That is right."

The Court: Which certificate is this?

Mr. Strubing: This is the Register of Cargo here, page 1 of the certificate of boom test.

[fol. 108] The Court: What exhibit number?

Mr. Strubing: I think it is marked Defendant's Exhibit 8. I am not sure of that.

The Court: All right.

(The reading of the deposition continues as follows):

"Q. Were the facts stated therein true to the best of your knowledge?

A. Yes.

Q. The document which has been marked as Third Party Defendant's Exhibit 1-A is, as I understand it, the Completion Certificate covering Hull No. 4350?

A. That is right.

Q. That was signed by you on July 16, 1941?

A. It was.

Q. For what reason or purpose did you sign that?

A. To show that the ship was finished.

Q. Was that a part of your duties?

A. It was.

Q. Did you sign it in the ordinary course of those duties?

A. I did.

Q. Are the facts stated therein true?

A. What facts?

Q. In the certificate, to the best of your knowledge?

A. Yes, except for a few minor details which are taken care of in an unfinished work list.

Q. Was the topping lift block at the boom end of the ten-ton boom included in any list like that?

A. No.

Q. Mr. Pearlman, the catalog which has been identified as Defendant's Exhibit No. 4 is the catalog of McMillan's Sons, Inc., No. 95, to which the specification referred, is it not?

[fol. 109] A. That is right.

Q. Are you a graduate engineer of any institution?

A. Yes, sir.

Q. What institution?

A. New York University.

Q. When?

A. 1934.

Q. What kind of work have you been doing since that time?

A. Marine.

Q. Marine engineering?

A. That is right.

Q. Have you, in the course of that work, had anything to do with regard to testing of cargo gear on ships?

A. I have.

Q. What has been the extent of your experience in that regard?

A. I was assistant superintending engineer of a steamship company prior to coming to George G. Sharp, having to do with maintenance, repair and operation.

Q. That included, of course, cargo lifting gear?

A. That included all departments on board a ship. Since employment by George G. Sharp——

Q. When?

A. In 1937; I have been employed in the design, inspection, construction, and all the various phases of shipbuilding, including the testing of machinery and cargo-handling gear.

Q. In your work for George G. Sharp, to what extent have you gained familiarity with the methods of operation of shipyards in this country?

A. In the course of my duties, I have to visit the shipyards frequently; in fact, practically all my time is spent in shipyards, both outside and inside the office.

Q. Can you name some of those shipyards which you have visited during the past four or five years?

[fol. 110] A. Atlantic Works; Simpson Plant; Fall River, which is in Boston; Teetjen & Lang; Fletcher's; Shewan's; Morse's; Robin's; Tebo; Key Highway, which is Bethlehem; Norfolk Shipbuilding; Pendleton at New Orleans; California Ship, Los Angeles; Western Pipe and Steel; Moore's Drydock; Kaiser Yards 3 and 4, at San Francisco Bay; Kaiser Company, Vancouver, Washington.

Q. Are those shipyards that you have mentioned, Mr. Pearlman, reputable and responsible shipyards in this country?

A. Yes.

Q. Do you know whether there is a usual and customary method used by the responsible and reputable shipyards in and around this country for testing cargo-lifting gear on newly constructed ships?

A. Yes.

Q. How did you acquire knowledge of the existence of that method?

A. By doing it myself.

Q. Is the method of which you speak used by the shipyards which you mentioned?

A. Yes, to the best of my knowledge.

Q. What is that method, Mr. Pearlman?

A. The lifting of a weight, swinging it over the hatch, then letting it down and returning it.

Q. Is there any other method of testing cargo-lifting gear on newly-constructed ships which, to your knowledge, is in general use by responsible and reputable shipyards in this country?

A. No, unless there are some specific instances I have not heard about or seen.

Q. I asked about general use.

A. Not in general use, no."

Mr. Strubing: That is all.

Now, if your Honor please, that is all I have, with the exception of one witness, and he is with the Maritime Com-

[fol. 111] mission, and he is out of the city, and will not be back until Friday. I do not like to ask your Honor to hold this case over for him, but if this test is going to be made I do not believe it will delay it in any way.

The Court: As a matter of fact, I will not be able to sit tomorrow, as I told you gentlemen at the beginning of the trial, it will have to go over to Friday anyhow. We could not go to the jury this afternoon under any conditions.

Mr. Strubing: I would not think so.

The Court: Oh, no, because I will want to hear some legal argument.

Your one witness, from the Maritime Commission, perhaps Mr. Freedman can agree to what he will testify to.

Mr. Freedman: Maybe so.

The Court: What do you propose to prove by him?

Mr. Strubing: He is another of the men that signed the Register of Cargo Gear, that certificate of boom test and the certificate of cargo lifting gear, examination and test.

The Court: You will not need him here for that, will you? Mr. Freedman will agree that he would so testify, of course.

Mr. Strubing: He will testify that he was present, and the test was made, and the certificate was made after he made the test.

Mr. Freedman: If he will testify the same as the other fellow testified.

Mr. Strubing: What I am trying to prove by this witness, your Honor, is that he was present at the test, and that the statements contained in the certificates which he signed were true of his personal knowledge, and that the inspections as set forth in those certificates were actually carried out.

[fol. 112] Mr. Freedman: If you will say he will so testify I will admit it.

The Court: You would agree?

Mr. Freedman: We admit that he would so testify if Mr. Strubing says that is what he would say.

The Court: It is understood that if called the witness would so testify.

Mr. Strubing: His name is Max Schrieber.

The Court: What is his position?

Mr. Strubing: He was then with Bethlehem Sparrow's Point.

The Court: He was in some official position, was he? Inspector?

Mr. Strubing: He was engineer, I think.

Mr. Evans: He was their representative.

The Court: All right, he was a representative of Bethlehem Sparrow's Point.

Mr. Strubing: That is right.

The Court: And an engineer.

That closes your case, does it not?

Mr. Strubing: Yes, sir.

The Court: Now, Mr. Freedman, have you something?

Mr. Freedman: I want to read something else that neither Mr. Evans nor Mr. Strubing read from their own testimony, Mr. Pearlman's testimony.

He was asked a question by Mr. Byrne:

"Were tests of the lifting capacity of this ten-ton boom conducted?"

That is on page 12.

Mr. Strubing: I would like to say this: Mr. Freedman said part of the examination that I did not read from my [fol. 113] witness. I read everything in this man's deposition as my witness, your Honor.

The Court: Yes, all right.

What are you going to do?

Mr. Freedman: I can read the whole thing. It is only two or three questions. It does not amount to much.

Question by Mr. Byrne:

"Q. Were tests of the lifting capacity of this ten-ton boom conducted?"

He answered "yes".

"Q. Were you present at that time?"

And he answered:

"I can't tell you whether or not I was personally present."

The Court: Is this Pearlman?

Mr. Freedman: Pearlman, yes, sir, page 12.

"Q. I show you page 1 of Defendant's Exhibit 8 and ask you if that is your signature?"

That is the Exhibit 8, I believe, which is the certificate which was offered in evidence before.

The Court: Yes.

Mr. Freedman: He said:

"Yes, that is my signature.

Q. I ask you to read the two typewritten lines above your signature.

A. (Reading.) 'The boom tests were conducted in our presence on June 23 and July 8, 1941, at the plant of Bethlehem Sparrow's Point Shipyard, Inc.'

Q. Do you have any particular recollection of the conducting of these tests on this particular boom and gear?

A. No, it being one of six ships.

[fol. 114] Q. Was your name signed there in the ordinary course of your business in connection with this hull?

A. As chief inspector on the job, I would naturally sign it.

Q. Would you have signed it if you had not witnessed the test?

A. Yes.

Q. Did you understand my question?

A. Would I have signed it if I had not witnessed the test?

Q. Yes.

A. As long as somebody witnessed it."

Mr. Byrne: That was not the exact reading of that line, Mr. Freedman.

Mr. Freedman: (Reading.) "As long as somebody in my crew had witnessed it."

You are not implying that I am misrepresenting, are you?

The Court: Does that close your rebuttal?

Mr. Freedman: Yes, sir.

The Court: All evidence is now closed?

Mr. Evans: There is part of that which Mr. Freedman did not read. I think he stopped too soon. I will just read a few more lines.

Mr. Freedman: It is all yours, Mr. Evans. You could have offered it in the first place.

Mr. Evans: (Reading.) "As long as somebody in my crew had witnessed it.

Q. In other words, someone acting for you would, in the ordinary course of events, have witnessed that test?

A. That is right.

Q. Were there any complaints made to you that that test was not properly run?

A. No."

That is a better stopping point, I think.

[fol. 115] The Court: Gentlemen, I understand that you made a very proper arrangement in this case. How shall we place that on the record? Perhaps you better just come up to side bar here, if you will.

(The following took place at side bar):

The Court: The parties now stipulate that the jury may be excused from further consideration of the case and that the case be disposed of by the Court in all respects as though a jury trial had been waived before the case attached. The parties also stipulate, in the event that the Court enters a judgment for the plaintiff against any or all of the defendants, it shall be in the amount of $9,500.

* * * * * * *

THOMAS C. ACKER, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Evans:

Q. Captain Acker, what is your profession?
A. I am a shipmaster.
Q. How long have you followed the sea?
A. Eighteen years.
Q. What license do you hold at the present time?
A. Unlimited, Master.
Q. At the present time you are the master of a vessel which just arrived in Philadelphia yesterday?
A. I am.
Q. And you expect to be here only——
A. —day before yesterday.
Q. When you first started to go to sea, in what capacity did you go to sea?
A. Ordinary seaman.
Q. And you followed the sea ever since?
A. Yes, sir.
Q. Did you serve on board the "Robin Sherwood"?
[fol. 116] A. I did, yes, sir.
Q. When did you join her?

A. The latter part of September, in 1942.

Q. Were you serving on board on December 23, 1942?

A. Yes, sir, I was chief officer on her at that time.

Q. Were you on board at the time the accident happened on that date to Joseph Steracki?

A. I was, yes, sir.

Q. Did you see the accident happen?

A. No, I did not.

By the Court:

Q. What was your position on board?

A. Chief Officer.

By Mr. Evans:

Q. Where were you at the time the accident happened?

A. I was on the fore deck.

Q. What attacted your attention to the accident?

A. The noise of the boom falling.

Q. Then you went to the scene of the accident?

A. Immediately, yes, sir.

Q. Tell us what you saw.

A. I saw the boom, the end of it, laying on the 20-millimeter gun turret. It had crushed that in a bit. The man on the resistor house top was taking care of the longshoreman that was injured. I saw the block, the topping lift, hanging down from the mast.

Q. And that block had this shackle fastened to it?

A. Yes, sir.

Q. I show you a shackle which is marked Defendants' Exhibit 9 and ask you if that is the shackle which parted on that occasion.

A. Yes, sir, that is the shackle.

Q. Was that subsequently taken down from the boom?

A. Yes, sir.

Q. And you examined it when it was taken down?

A. I did, yes, sir.

[fol. 117] Q. As Chief Officer of this vessel, what were your duties with reference to the gear and tackle on the vessel that was used in loading and discharging cargoes?

A. Well, the cargo gear is entirely my responsibility. I mean it is up to me to inspect and see that it is in good shape and workable condition at all times—all of the cargo gear.

Q. Did you make an inspection of the gear prior to December 23, 1942?

A. Yes, sir, I did.

Q. When and where did you make that inspection?

A. It was made on the homeward-bound voyage preceding the accident—at sea.

Q. About how long before the accident was that inspection made?

A. Well, it was within two or three weeks. I am not positive of the dates, but it was on the homeward-bound voyage, and that ended a couple of weeks before the accident.

Q. Will you tell us just what was done on that occasion, with particular reference to this boom and block and shackle?

A. Well, all of the cargo blocks, removable gear, on that particular ship are fitted with alemite fittings; and it is the carpenter's job to grease all of the cargo gear, and I had given him his orders to grease it, and he reported to me that everything was finished, so I made an inspection of the entire ship from fore to aft.

By the Court:

Q. What date was that?

A. It was within two or three weeks of the time of the accident. It was on the homeward-bound voyage. It was at sea. And I inspected every bit of gear on the ship; and that, of course, includes this ten-ton boom.

By Mr. Evans:

Q. In what position was this ten-ton boom when you examined it?

[fol. 118] A. It was vertical, parallel to the mast, and housed.

Q. And in order to examine or inspect it, what did you have to do?

A. I had to go up the mast.

Q. Did you go up the mast?

A. Yes, sir.

Q. And did you look at this shackle and the block that it was fastened to?

A. All that I inspected on the shackle was to see that the pin was in and secure, but I had to hold on to the shackle in order to look at the block and see that it was greased.

Q. So you actually had a hold of this shackle?

A. I actually held on to the shackle to look at the block.

Q. I call your attention to the outside of the bow or U of this shackle, to a slight rise in the contour of the shackle, and ask you what if anything that suggests to you.

A. It is a forged shackle, and that is part of the roughness left from the forging.

Q. Does it suggest to you that there might be any weakness or defect in that shackle?

A No, sir.

Q. How did that shackle appear, with that rising of metal at that place, compared with other shackles that you have seen and inspected?

A. Well, they practically all have it.

Q. They are all that way?

A. Yes. This has got it a number of different places. Here is another one right over here, the same thing.

Q. After a ship is delivered, what inspections and tests is it customary for the vessel, its crew and officers, to make of the cargo gear? What is the general practice followed?

A. After it is turned over, you say?

Q. After it is turned over to the owners.

[fol. 119] By the Court:

Q. At the time.

A. At the time just before it is turned over, all of the cargo gear is physically tested to a 25 per cent. overload. Afterwards, after the ship's crew takes over, why, it is just a case of routine inspection of the Chief Mate to keep the cargo gear in condition.

By Mr. Evans:

Q. When you make those inspections, what do you look for?

A. Well, I look for wear in the wire, bad wire, that is, wire that is starting to show wear, and frayed guy ropes.

By the Court:

Q. Rust?

A. Rust and bad shape, yes, sir. There is always a certain amount of rust on the average cargo gear.

By Mr. Evans:

Q. When the ship is delivered to you, you have certificates of this inspection that you are talking about?

A. Oh, yes; yes, sir.

Q. Do you rely on those certificates?

A. Always have, yes, sir.

Q. Do you ever test the shackles or gear by what is known as the ringing or bell test?

A. I never heard of it, no, sir. I have never done it.

Mr. Evans: Cross-examine.

Cross-examination.

By Mr. Freedman:

Q. When did you last see this shackle, Captain, before you took the stand here?

A. Why, when it was taken off the ship. I believe your firm took it off the ship.

Q. And between that time and today, since you took the stand, you haven't seen that shackle?

A. No. That is right.

[fol. 120] Q. So when you pointed to something on the shackle there and said, "Here is another one," without even picking it up and examining it, you remembered it from the last time; is that right?

A. No, sir, I just happened to notice it there.

Q. Without picking it up, and you just noticing it here?

A. Yes.

Mr. Freedman: That is all.

By Mr. Strubing:

Q. Captain, one witness testified, perhaps inadvertently, that this accident happened with the 30-ton boom on this ship; isn't that correct?

A. No, sir, that is not; it happened with the ten-ton boom.

Q. Ten-ton boom at the No. 5 hatch?

A. That is right.

Q. No doubt about that at all?

A. Absolutely none, no, sir.

Mr. Strubing: That is all.

Mr. Evans: All right, thank you very much.

By the Court:

Q. You don't carry a metallurgist on your ship, do you?
A. No, sir, we do not.
Q. Or X-ray apparatus?
A. No, sir, neither.

DISCUSSION

The Court: Is there anything further?

Mr. Evans: I think that is all, Your Honor.

The Court: You said in your letter that you wanted to make a microscopic examination.

Mr. Evans: That is right. And now we would like to discuss a determination of the examination. Our idea is that we take a piece about a half inch back from the fracture, so as not to disturb either of the fractured ends, and [fol. 121] still be within this lump of metal which Mr. Money testified in his opinion had been added, and have this test made of that piece. That will not destroy the shackle.

Mr. Strubing: I am told, Your Honor, that you can go back about a half inch from the fracture and take a section out either an eighth or a quarter of an inch wide and go down.

The Court: Not cut all the way through?

Mr. Strubing. You don't have to cut all the way through, and you don't have to take a very wide piece out; and then they make what is called a macro-section examination, which would show definitely whether nickel had been added.

The Court: Both experts agreed that it was a matter that could be definitely determined. There wasn't any doubt about that. Now, the only question is—what do you say about it, Mr. Freedman?

Mr. Freedman: Well, if we are going to make a test, we ought to make it right at the spot where the break occurred, because that is the place where the metal would definitely be added. How far back it would go would then be problematical.

The Court: I think you ought to make it pretty close to the break.

Mr. Evans: Mr. Money testified it ran two inches past one side of the break and an inch and a half past the other.

Mr. Freedman: He said that is what it looked like.

The Court: The crack may have extended some distance. The crack was longitudinal.

Mr. Freedman: That is right, sir.

The Court: If it was visible at all, it was a longitudinal crack.

Mr. Freedman: It might only have been an eighth of an inch or a quarter of an inch or more, but certainly it [fol. 122] was right here in this vicinity. We don't know how far back it extended, but wherever they welded it, they would have welded it right at the crack.

The Court: I think you should be very close to the crack. They want to leave the surface; that is all.

Mr. Strubing: Suppose we put it up to the expert that he take a section as close to the fractured surface as possible, without destroying the fractured surface.

The Court: That would be all right with me. Now, do you think your two experts are enough? I am just as sure as I am sitting here that they will come in and one will say that the test is all right, but for some reason it does not show what it ought to, and the other will say that it does.

Mr. Evans: We think we ought to agree on an independent one.

The Court: Do you think you can agree?

Mr. Freedman: I think possibly we can.

The Court: If not, possibly I could dig up an independent one.

Mr. Evans: Well, either way. If we can't agree on one, we will let Your Honor pick one.

The Court: I will have to shop around.

Mr. Strubing: I think there is a metallurgist at University of Pennsylvania, Your Honor, and I also know of a firm named Coleman.

The Court: I don't want to take any more part in it than necessary, and if you can agree, all right. You will want to call him back, won't you?

Mr. Evans: He will submit a written report, I imagine, that we can just hand to you, unless we want to examine him.

Mr. Freedman: I think it ought to be done right away, so this thing isn't protracted.

[fol. 123] The Court: Oh, yes, I want to get this done right away. Why can't you do it tomorrow or Monday?

Mr. Freedman: I think it ought to be done today.

The Court: Yes.

Mr. Freedman: Mr. Money tells me there are any number of very reputable metallurgists in town who conduct this sort of thing.

The Court: I suggest you stipulate that the independent expert shall submit a written report to the Court, which shall be taken as his testimony, and that if either side wishes him to appear for cross-examination, he may appear and either side may cross-examine him.

Mr. Strubing: Don't you think we ought to put a precise question to him, Your Honor, instead of having him work up all kinds of ideas?

The Court: The question the Court is interested in is whether or not, in his opinion, as based on the tests he makes, additional material was added at the point where the examination is to be made—after forging. Is that right? After forging of the shackle?

Mr. Strubing: Let us say after bending of the shackle.

Mr. Freedman: No, after forging of the shackle.

Mr. Strubing: That is how it was bent, isn't it? I thought I was giving you a break. Let us make it "forging."

The Court: All right, after forging the shackle.

Mr. Freedman: There is another thing that I thought might be added, Judge, and that is I don't know what the welding process would leave; and I thought that was just as important as the other, whether there is any evidence of a welding process after the forging process.

The Court: All right. And whether there is any evidence of a welding process at the point in question, after the original manufacture was completed.

[fol. 124] You are only going to get this thing mixed up by submitting a question. You know what you want and you tell him and he can make his report.

Mr. Freedman: I think that would be better.

The Court: Strike all that out. I think so, too.

Mr. Strubing: Some of the men like to develop new theories. We will get an entirely new theory. He may even say the pipe had nothing to do with it.

The Court: No, no; he knows what we want. He is interested in only that one question of whether this thing was doctored. That is the simplest way to put it.

Mr. Freedman: That is the answer to it.

The Court: That is all there is to it.

Mr. Strubing: I don't know whether, to keep the record straight, I should make a motion for a directed verdict, as long as the jury has been dismissed.

The Court: No, you are going to submit requests, and they will include a request for judgment.

[fol. 125] REPORT OF H. C. KNERR TO KIRKPATRICK, J.

Registered Professional Engineer
Commonwealth of Pennsylvania
President, Metallurgical Laboratories, Inc.
(Metlab Co.)
Director, Metallurgical Course
Temple University

Horace C. Knerr
Consulting Metallurgical Engineer
4000 E. Mermaid Lane, Chestnut Hill
Philadelphia, Penna.
CHE 3500

May 9, 1944.

Honorable William H. Kirkpatrick, 2096 U. S. Court House, 9th and Chestnut Streets, Philadelphia, Pa.

DEAR JUDGE KIRKPATRICK:

At the request of counsel in a case which I understand is pending before you, I have examined a certain shackle which was delivered to me by the Court Officer.

I conducted the examination in the following manner:

A saw cut was made transversely to the axis though the piece as close to the fracture as practicable, namely within about one-quarter inch. Another cut was made approximately one-half inch back from the first cut thereby removing a segment from the full diameter of the bar, about one-half inch thick. The two flat faces of the disc were then ground and roughly polished to a smooth surface to remove the effects of sawing.

Any paint was removed with a solvent. The piece was then subjected to hot 50% hydrochloric acid solution for a total period of 15 to 20 minutes. This first removed all scale and foreign material from the outer, round surface. Then the entire surface of the piece was etched by the acid

[fol. 126] in such a way as to reveal any flaws, inclusions or non-uniformities of structure or composition which were present. This process constitutes a routine metallurgical test known as hot acid etch, deep etch, or macro-etch.

It was found that the pipe observed in the original fracture extended fully one-quarter inch in, appearing as a cavity in the adjoining surface of the removed piece. The crack or seam which was observed in the original fracture was found to extend entirely through the diameter of the forging on both sides of the pipe or cavity, and longitudinally for a distance at least ¾" back from the point of fracture. This crack was made visible on the outer opposite surfaces of the bar by the acid etching, which tends to open and reveal defects otherwise not visible to the eye.

Where this crack reaches the top outer surface of the shackle it is, even after hot acid etching, barely visible.

Examination of the outer surface of the piece and of the transverse section, after hot acid etching, clearly shows that no additional metal was added in this area after forging of the shackle.

There is no evidence of a welding process having been used on the top of the shackle after the forging process.

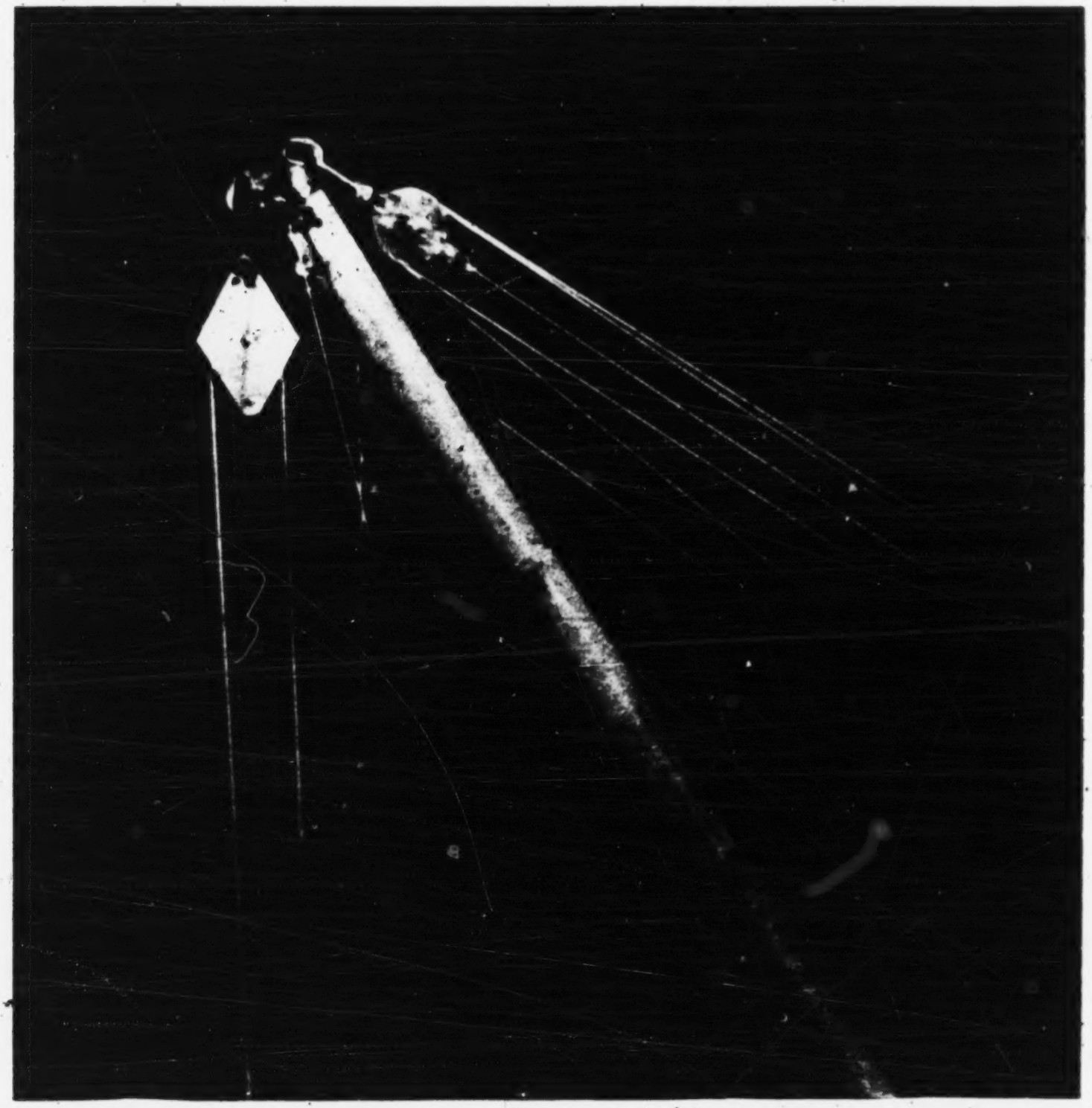
There is no evidence that the top of the shackle was doctored after forging to conceal a defect, either by peening or otherwise.

Very respectfully yours, Horace C. Knerr.

HCK:rsh

(Here follow 3 photos, side folios 127-128, 129-130, 131-132)

PLAINTIFF'S EXHIBIT NO. 1



Form M.C. ... 11

UNITED STATES OF AMERICA
MARITIME COMMISSION

CERTIFICAIE
OF BOOM TEST

The undersigned persons do hereby certify that the gear used in the hoisting and lowering, including the winches, of the

STEAM [redacted] SHIP ROBIN HOOD PORT OF REGISTRY [redacted] FUNK

OWNERS SEAS SHIP IN[illegible] COMPANY

OPERATORS SEAS SHIP [illegible] COMPANY

has been tested under the load specified herein and thoroughly examined in compliance with regulations as mentioned below:

Included herewith is a blueprint of the stress diagram, showing also the length, sizes and dimensions of the booms, masts, kingposts and principal wires and fittings.

Number Of Booms [redacted]	Maximum Working Load In Tons Of 2240 Pounds	Test		Remarks
		Proof Load Applied In Tons Of 2240 Lbs.	Minimum Angle Of The Boom With The Horizontal Plane	
16	5	6.25	15°	
1	10	12.5	25°	
1	10	10	25°	

OF BOOMS.

The undersigned persons do hereby certify that the gear used in the hoisting and lowering, including the winches, of the

STEAM/MOTOR SHIP ROBIN SHERWOOD PORT OF REGISTRY NEW YORK

OWNERS SEAS SHIP INDUSTRY COMPANY

OPERATORS SEAS SHIP INDUSTRY COMPANY

has been tested under the load specified herein and thoroughly examined in compliance with regulations as mentioned below;

Included herewith is a blueprint of the stress diagram, showing also the length, sizes and dimensions of the booms, masts, kingposts and principal wires and fittings.

Number Of Booms	Maximum Working Load In Tons Of 2240 Pounds	Test		Remarks
		Proof Load Applied In Tons Of 2240 Lbs.	Minimum Angle Of The Boom With The Horizontal Plane	
16	5	6.25	15°	
1	10	12.5	25°	
1	20	25	25°	

After completion of the test a careful examination of the cargo gear did not reveal any deformation, excessive chafing, scoring of metal, or other defects as far as could be ascertained. The winches were found to be in good condition and worked without undue strain or vibration. The safe working load has been indelibly marked on all booms, winches, blocks, chains, hooks, etc. In addition, the minimum angle to the horizontal at which the safe working load may be lifted has been marked on all booms.

The boom tests were conducted in our presence on June 23-July 8, 1941, at the plant of the Bethlehem-Sparrows Point Shipyard, Inc.

Signed: [signature] Representing George G. Fury for U.S.M.C.

Signed: [signature] Representing Bethlehem-Sparrows Point Shipyard, Inc.

Signed: [signature] Representing U.S.M.C.

* Scratch out cranes if no cranes are installed.

DEFENDENT'S EXHIBIT NO. 5

Form M.C.H. III
No._____

UNITED STATES OF AMERICA
MARITIME COMMISSION

CERTIFICATE
OF TEST AND EXAMINATION OF LIFTING GEAR

For Ship [redacted]

_____ Number ____ Out of ____

Namely, Blocks, Chains, Rings, Hooks, Shackles and Swivels, Issued By Private Testing Establishment.

Distinguishing Mark	Description of Gear	Number Tested	Proof Load Applied	Date Proof Load Applied	Safe Working Load
Cargo Purchase Lower	12" Double, Steel	16	6.25 Long Tons	6/23 - 6/28/41	5 Long Tons
Cargo Purchase Up	12" Double, Steel	16			
Topping Lift Purchase at Boom	12" Double, Steel	16			
Topping Lift Purchase at King Post	12" Double, Steel	16			
Cargo Shackle	10"	16			
Cargo Fall Shackle	10"	16			
Head Blocks	12" Single, Steel	16			
Cargo Purchase Lower	14" Double, Steel	1	12.5 Long Tons	7/8/41	10 Long Tons
Cargo Purchase Upper	14" " "	1			
Topping Lift Purchase at Boom	14" " "	1			
Topping Lift Purchase at King Post	14" " "	1			
Cargo Falls Lead Block at Mast	14" " "	1			
Topping Lift Lead Block at Mast	14" " "	1			
Cargo Fall Lead Block at Boom	14" Guide Sheave, Steel	1			

Was the gear examined by a competent person after application of the proof load and found to have withstood the load without deformation and found to be free from cracks, flaws and other defects? ..... Yes

Name and address of makers or suppliers Bethlehem-Sparrows Point Shipyard Inc. W. J. McMillan & Son, 49 South St., New York, N.Y.

LIFTING GEAR

Number ____ Out of ____

Namely, Blocks, Chains, Rings, Hooks, Shackles and Swivels, Issued By Private Testing Establishment.

Distinguishing Mark	Description of Gear	Number Tested	Proof Load Applied	Date Proof Load Applied	Safe Working Load
Cargo Purchase Lower	12" Double, Steel	16	[illegible]	[illegible]	[illegible]
Cargo Purchase Up	12" Double, Steel	16			
Topping Lift Purchase at Boom	12" Double, Steel	16			
Topping Lift Purchase at King Post	12" Double, Steel	16			
Cargo Shackle	10"	16			
Cargo Fall Shackle	10"	16.			
Head Blocks	12" Single, Steel	16			
Cargo Purchase Lower	14" Double, Steel	1			
Cargo Purchase Upper	14" " "	1			
Topping Lift Purchase at Boom	14" " "	1			
Topping Lift Purchase at King Post	14" " "	1			
Cargo Falls Lead Block at Mast	14" " "	1			
Topping Lift Lead Block at Mast	14" " "	1			
Cargo Fall Lead Block at Boom	14" Guide Sheave, Steel	1			

Was the gear examined by a competent person after application of the proof load and found to have withstood the load without deformation and found to be free from cracks, flaws and other defects? ..... Yes

Name and address of makers or suppliers Bethlehem-Sparrows Point Shipyard Inc. W. L. MacMillan & Son, 49 South St., New York, N.Y.

Name and address of firm or persons making the test or examination. ..... Bethlehem-Sparrows Point Shipyard Inc.

I Hereby Certify that the above particulars are correct.

(Signature) [signature]

Representative of firm or person making test or examination

Date 7/8/19 41

Note:- Chains not exceeding 1¾ inches in diameter and rings, hooks, shackles, and swivels must be subjected to a proof load equal to twice the safe working load. Larger chains to a proof load equal to one and one-half times the safe working load.

1040

[fol. 133] EXCERPTS FROM DEFENDANT'S EXHIBIT NO. 6

Cargo Handling Gear

General Regulations

1. All cargo handling gear is to be designed for a boom angle of 15 degrees with the horizontal for booms up to 8 tons working load (2240 lbs. per ton). For booms and derricks over 8 tons, the minimum boom angle shall be [illegible] degrees with the horizontal plane.

2. All masts, kingposts, booms, pins, shackles, chains, fittings, and other gear are to be designed with a factor of safety of 5.0, including standing and running rigging.

3. Steel of uniform quality and to requirements and approval of the American Bureau of Shipping is to be used throughout.

4. Chafing between fittings caused by swinging booms or loads shall be avoided wherever possible in order to prevent gradual decrease of sectional area. Fittings for topping lift blocks and/or similar attachments, shall consist of swivels and pins of ample size to prevent undue wear by chafing, binding, or bending.

5. Allowable margins of wear and tear: Chains, shackles, bolts, swivels, chainplates, eyebolts and other forgings should be renewed if the dimensions have diminished more than 15%.

Steel plates or angle constructions should be renewed if the dimensions have diminished more than 25%.

If it should appear that the part has originally been constructed heavier than required in these rules, a larger margin of wear and tear may be allowed in special cases.

Steel wire should be renewed in case of serious rust formation or if more than 10% of the composing wires have been broken within a distance of 10 times the circumference of the cable.

[fol. 134] Boom topping lifts of steel wire may in no case be used for a period of time longer than 8 years.

(a) In case of important alterations or renewals, as well as after an accident, the retesting of rigging or gear is required before it is put back into use.

6. No single links or any chain shall be used unless it is machine tested and entered into the Certificate, Form M.C.H. III.

Boom Test

7. All cargo handling gear including booms, derricks, cranes, winches, etc., are to be tested before delivery of new vessels and once every four years thereafter in the manner described below:

8. The tests are to be conducted in the presence and to the satisfaction of a Government Inspector.

9. At testing time the entire cargo handling equipment, including winches, electrical equipment, boom stowage, etc., must be complete.

10. Current for winch operation during the test must be taken from the ship's generators and through the ship's cables. Shore wiring or temporary wiring will not be permitted.

11. Booms are to be tested with an overload of 25% for loads up to 50 tons, but this overload not to exceed 5 tons.

Pig iron, water filled tanks, or any other load that can be safely attached to the cargo hook may be employed as the test load.

12. Every boom up to 8 tons is to be tested with a boom angle of 15 degrees to the horizontal, the full test load specified in paragraph 11 is to be swung inboard and outboard as far as obstructions permit.

Only one boom at each hatch will be required to lower its full test load to the tank top and back again.

[fol. 135] Te vang tackles for booms up to 8 tons may be operated by hand or by winch power during the tests at the discretion of the inspectors.

13. Hook speed is required to be tested only for booms up to 8 tons and for one winch only, provided all winches are from the same manufacturer.

14. Both the electro-magnetic and mechanical brakes must be able to stop and hold the load, instantly and independently from each other, in any position of the hook.

15. The heavy goods boom (over 8 tons) shall be tested in substance as described above and as detailed below:

(a) Top the boom at a 25 degree angle to the horizontal.

(b) Lift load as prescribed in paragraph 11 from either deck, lighter, or pier.

(c) Top the boom high enough to clear obstructions and swing load over the hatch.

(d) Top the boom under full load to the last quarter of the hatch nearest the boom.

(e) Test both brakes separately and diligently to avoid accidental slipping of the load.
Avoid sudden stops.
Lower the test load to deck, lighter or pier.

(f) Vang tackles must be winch operated.
For booms over 30 tons the vang purchase is to be made of steel blocks and wire rope.

(g) Lifting and swinging tests as under (a) to (e) only are required, no other lifting or lowering into the hold, etc.

16. It must be demonstrated that all topping lifts are long enough to lower the boom into the boom crotch with at least three turns of the wire rope still on the gypsy head or winch drum. The end of the wire rope must be hooked to or otherwise securely fastened to the gypsy head or winch drum.

[fol. 136] 17. The cargo whip must be long enough to lower the hook to the tank top at the last quarter of the hatch nearest to the boom, with at least three turns of the rope still remaining on the drum, and with the end of the wire rope securely fastened to the drum.

18. If wire rope instead of long lift topping chains is used, demonstrate the transfer of the topping lift wire from the gypsy head to cleats by means of the wire clamp and tackle.
This demonstration is required for one boom at each hatch only, but the Inspector must be definitely sure that the pads and cleats for all other booms are in their proper location and of the proper size.

Cleats and bitts for belaying topping lift wires are to be of ample proportions to avoid accidental slipping of the wire rope.

19. After the completion of these tests as described above, a thorough and careful examination is to be made of all gear to assure that no permanent deformation, chafing or scoring of pins, pads, cleats and other fittings or gear has taken place; nor must there be any other evidence of overstraining, faulty design or poor workmanship.

20. The capacity must be clearly marked on all booms, winches, blocks, chains, etc., either by stamping, center punching, or similar indelible and durable methods.

These capacities are to be underlined with a white paint line about 1" wide, or framed by a white square.

In addition, the minimum angle to the horizontal at which the safe working load may be applied, must be marked on all booms.

21. A Certificate of standard form No. *M. C. H. II* of the tests as conducted above is to be attached to the Register of Cargo Gear.

A stress diagram shall accompany this Certificate, giving the size, length, diameter, etc., of the masts, kingposts and booms; also the diameter of wire rope, pins, blocks, and all important fittings.

[fol. 137] The diagram shall show the stresses at 15-degree and 25-degree angles to the horizontal as described in paragraph 1, these angles being the lowest practicable angles producing the maximum stresses.

In addition to the *Certificate of complete cargo handling gear, Form M. C. H. II*, one *Certificate of blocks, chains, etc., Form M. C. H. III*, and one *Certificate of wire rope, Form M. C. H. IV*, shall be included in the *Register of Cargo Gear.*

22. A thorough inspection of the entire cargo handling gear, including winches, is to be made once a year in the presence of a Government Inspector. The dates of these inspectors shall be entered in this Register.

23. All chains attached to the booms and lifting gear and all rings, hooks, shackles and swivels used in hoisting or lowering in connection with the loading or unloading of

the ship shall be effectively annealed by a competent plant as follows:

(a) All chains, rings, hooks, shackles and swivels *in general use*, once every twelve months.

(b) A record shall be kept in the Register Of Cargo Gear, indicating the dates of each annealing and the names of the annealing plants.

[fol. 138] THIRD PARTY EXHIBIT No. 1

George G. Sharp, Naval Architect,
30 Church Street, New York City.
Design Division

July 16th, 1941.

Chief, Construction Section, United States Maritime Commission, Washington, D. C.

Subject: SS Robin Sherwood, M. C. Hull, No. 99, Builder's Hull No. 4350. Completion Certificate

DEAR SIR:

1. This is to certify that the SS Robin Sherwood, United States Maritime Commission Hull No. 99, Builder's Hull No. 4350, has been completed in accordance with the contract plans, specifications and approved changes therein and that the work is satisfactory throughout.

(Signed) A. O. Evelyn, Hull Inspector; S. J. Corb, General Manager, Bethlehem Steel Company.

(Signed) Harold Pearlman, Machinery Inspector.

Approved: (Signed) J. F. Barnes, Assistant Chief—Construction Section, Technical Division.

Address All Correspondence to This Office in Quadruplicate.

[fol. 139] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Learned Trial Judge Is Requested to Make the Following Findings of Fact:

(1) The United States Maritime Commission awarded the contract for the construction of the steamship "Robin Sherwood" to the Bethlehem Steel Company.

(2) The Bethlehem Steel Company subsequently contracted with the Bethlehem Sparrow's Point, Inc., whereby the latter agreed to construct part of the vessel.

(3) The said vessel was completed in June or July of 1941 and delivered to the defendant, Seas Shipping Company.

(4) The part of the vessel which was constructed by the Bethlehem Sparrows Point, Inc., included the ten ton boom and gear at number five hatch.

(5) Shortly before the vessel was turned over to the Seas Shipping Company, the ten ton boom and gear were tested by lifting a dead weight of twelve and one-half tons from a lighter, across the deck of the vessel and back to the lighter.

(6) No other test or examination of the shackle which supported the boom was made.

(7) The master of the vessel, as a representative of the Seas Shipping Company attended the test in the capacity of an observer.

(8) The Seas Shipping Company took over the vessel in June or July of 1941 and thereafter operated the vessel for a period of approximately eighteen months until December 23rd, 1941. During all this period the ten ton boom and tackle was never used.

(9) On December 23rd, 1941, the plaintiff, Joseph Sieracki, was engaged by the Atlantic & Gulf Stevedoring Company as a longshoreman to aid in loading cargo aboard [fol. 140] the vessel while it was at pier 98 S. Wharves in

Philadelphia. The cargo consisted of parts of freight cars, the weight of which did not exceed 8.2 tons.

(10) Plaintiff was operating one of the winches which controlled the ten ton boom at number five hatch. One part of a freight car was first lowered into the hold but while the second part was being lowered the shackle which supported the boom fractured at the crown of the shackle causing the boom and tackle to fall to the deck as a result of which the plaintiff was injured.

(11) The breaking of the shackle was caused by a gross defect in the center of the shackle known as a "pipe." This "pipe" extended longitudinally through the shackle for an undetermined distance but at least for ¾" from the point of break at the crown. There was also a fracture of the shackle which extended from the "pipe" to the surfaces of the shackle both top and bottom. This fracture extended back longitudinally from the point of the break for at least ¾" and was manifest at the surface when the shackle was forged.

(12) After the shackle was forged it was galvanized and this process would have a tendency to conceal the seam at the surface of the shackle. The subsequent painting of the shackle also would have a tendency to conceal the seam on the surface.

(13) The shackle in question was purchased by the Bethlehem Companies from the MacMillan Company. The latter company did not manufacture the shackle but purchased it from some other company whose name has not been disclosed.

(14) The shackle was not carefully inspected or examined by the Bethlehem Companies or by anyone, either at the time it was delivered to the Bethlehem Companies or at the time it was installed on the vessel or at any other time.

[fol. 141] (15) It was known by all the defendants that the shackle in question was to be used to support the ten ton boom. The failure of this shackle must result in the falling of the boom and tackle and with any load which it might at the time be hoisting, and thereby endanger human life as well as property.

(16) Although there is no evidence to show that the galvanizing and painting did in fact entirely conceal the fracture at the surface the test of twelve and one-half tons would undoubtedly expand the fracture in the shackle at the point of the break and thereby shatter or crack the outer superficial coating over the open seam at the crown of the shackle, even if it be assumed that the open seam had previously been entirely concealed.

(17) I find that the test of twelve and one-half tons was inadequate for purposes of discovering any hidden defects. A test of seventeen and one-half tons would have been a proper test under the circumstances.

(18) In view of the use which was to be made of the shackle the utmost precaution should have been taken to discover any hidden defects.

(19) An X-ray of the shackle would have been practicable under the circumstances and would have disclosed the defect inside the shackle even if it could not be visually detected.

(20) The defect in the shackle could have been discovered by what is known as the bell or ring test. This could have been accomplished merely by dropping the shackle on a metal surface or by suspending the shackle on a wire and tapping it with another piece of metal. The defect would have been revealed by a dull clacking sound as from a cracked bell or dish, as distinguished from a clear ringing metallic sound. This would have been a very practical test under the circumstances.

[fol. 142] (21) The Bethlehem Companies failed to use due care in failing to examine or apply the proper tests to the shackle.

(22) The defendant, Seas Shipping Company, failed to make any examination or test of the shackle during the entire period that the vessel was in its possession prior to the accident.

(23) The inspection of the boom which was made by the first mate about two or three weeks prior to the accident could not be termed a proper inspection under any circumstances. The mate merely examined the shackle at the open end to determine if the pin was properly in place.

He made no examination of the crown of the shackle where the defect was located.

(24) The Seas Shipping Company failed to use due care in failing to examine or apply the proper tests to the shackle.

THE LEARNED TRIAL JUDGE IS REQUESTED TO MAKE THE FOLLOWING CONCLUSIONS OF LAW:

(1) It was the duty of the Bethlehem Steel Company and Bethlehem Sparrows Point, Inc., as manufacturers of the vessel to use all reasonable means to determine the existence of any defects in the equipment.

(2) In view of the danger to human life and property the Bethlehem Companies should have used the utmost precaution in testing the shackle before installing it on the vessel.

(3) The Bethlehem Companies were negligent in failing to X-ray the shackle; in failing to apply the bell or ring test; in failing to apply an adequate lifting test; and in failing to make a careful visual inspection both before and after the lifting test.

(4) The Bethlehem Companies violated the duty which they owed the plaintiff and are therefore liable directly to him.

[fol. 143] (5) It was the duty of the Seas Shipping Company to provide a vessel and appliances which were seaworthy in all respects.

(6) There was an implied warranty on the part of the shipowner to provide a seaworthy vessel and appliances.

(7) The Seas Shipping Company failed in its duty to provide a seaworthy vessel and is therefore liable to the plaintiff.

(8) The Seas Shipping Company also owed to the plaintiff a further duty to be free from negligence to furnishing proper and safe appliances for the handling of cargo.

(9) The duty of the Seas Shipping Company to provide a seaworthy vessel and to make proper examinations and tests is non-delegable.

(10) The defendant, Seas Shipping Company, was negligent and failed to use due care in that it failed to make careful, periodic inspections of the tackle; in failing to apply the ring or bell test; in failing to apply the X-ray test and in failing to apply a proper lifting test.

(11) Judgment is directed to be entered in favor of the plaintiff against all three defendants, the Seas Shipping Company, the Bethlehem Steel Company and the Bethlehem Sparrows Point Company.

Freedman & Goldstein, by Abraham E. Freedman.

[fol. 144] IN UNITED STATES DISTRICT COURT

Original Defendant's Requests for Findings of Fact and Conclusions of Law

REQUESTS FOR FINDINGS OF FACT AS TO PLAINTIFF

The Defendant, Seas Shipping Company, Inc., respectfully requests the Court to make Findings of Fact as follows:

1. The Plaintiff, Joseph Sieracki, was a stevedore in the employ of Atlantic & Gulf Stevedores, Inc.

2. The "Robin Sherwood," a vessel owned by Seas Shipping Company, Inc., was in navigable waters in the port of Philadelphia on December 23rd, 1942.

3. The Plaintiff was on board the "Robin Sherwood" in his capacity as winch operator for Atlantic & Gulf Stevedores, Inc., on December 23rd, 1942.

4. The employees of Atlantic & Gulf Stevedores, Inc., were engaged in, and in complete charge of the, loading of cargo on the "Robin Sherwood."

5. The shackle at the boom end of the topping lift of the ten-ton boom at No. 5 hatch of the "Robin Sherwood" contained an internal flaw or defect known as a "pipe," which caused the shackle to break under a load of approximately eight tons.

6. The pipe or flaw in the shackle was within the metal and from the time the ship was delivered to Seas Shipping

Company, Inc., until the time of the accident reasonable and careful inspection did not and could not disclose the existence of the flaw nor any evidence that a flaw or "pipe" might exist within the metal of the shackle.

7. The flaw or defect was of such a nature that it could not have been discovered between the time of delivery of the vessel and the time of the accident except by an X-ray or a laboratory test.

8. Seas Shipping Company, Inc., had been furnished with certificates from the United States Maritime Commission and the ship builder which certified that the gear, in- [fol. 145] cluding the shackle here involved, had been tested with a load 25% in excess of its rated capacity of ten long tons and had been carefully examined after said test and before delivery of the vessel on July 16th, 1941.

9. The gear, including the shackle, had been stowed and not used between the date of delivery of the vessel and the date of the accident.

10. The shackle in question was galvanized and painted when delivered to Seas Shipping Company, Inc.

11. The shackle and gear were properly cared for and inspected while on board the "Robin Sherwood" prior to the accident.

12. The breaking of the shackle was not caused by nor contributed to in any way by Seas Shipping Company, Inc., its agents, servants or employees.

13. No metal had been added to the shackle in question after its manufacture.

14. Seas Shipping Company, Inc., did everything that was reasonably required of it to provide the Plaintiff with reasonably safe appliances and a reasonably safe place in which to work.

REQUESTS FOR CONCLUSIONS OF LAW AS TO THE PLAINTIFF

1. Seas Shipping Company, Inc., can only be held liable to the Plaintiff for its negligence.

2. There is no duty on a shipowner to X-ray and/or make laboratory tests of shackles which have been delivered

to it with the customary certificates of tests and examination made by reputable parties.

3. The Defendant, Seas Shipping Company, Inc., was not negligent in any respect and breached no duty it owed to the Plaintiff.

4. The Complaint as to Seas Shipping Company, Inc., should be dismissed.

[fol. 146] REQUESTS FOR FINDINGS OF FACT AS TO THIRD PARTY DEFENDANT BETHLEHEM STEEL COMPANY

1. Bethlehem Steel Company is a corporation incorporated under the Laws of the Commonwealth of Pennsylvania, which in September, 1939, owned and operated a shipyard at Sparrows Point, Maryland.

2. On the 25th day of September, 1939, Bethlehem Steel Company entered into a contract with the United States Maritime Commision in which it agreed to construct and sell for a stated price the vessel known as Hull No. 4350 which was later christened "Robin Sherwood."

3. The contract was to be performed and delivery made at Sparrow's Point, Maryland.

4. Bethlehem Steel Company was regularly engaged in the construction of ships at Sparrows Point, Maryland.

5. Clause No. 35 of the contract between the United States Maritime Commission and Bethlehem Steel Company provided, in substance, that Hull No. 4350 was being constructed for a Buyer who would succeed to all the rights of the United States Maritime Commission.

6. On the 4th day of April, 1940, the United States Maritime Commission and Seas Shipping Company, Inc., entered into a contract of sale under the terms of which Seas Shipping Company, Inc., became the Buyer referred to in paragraph 35 of the contract between the United States Maritime Commission and Bethlehem Steel Company above referred to.

7. On July 16th, 1941, the "Robin Sherwood" was sold and delivered to the United States Maritime Commission and immediately thereafter sold and delivered by the United

States Maritime Commission to Seas Shipping Company, Inc.

8. On July 16th, 1941, the shackle to the boom end of the topping lift of the ten-ton boom of No. 5 hatch of the [fol. 147] "Robin Sherwood" contained a defect which was not discoverable by Seas Shipping Company, Inc., by reasonable and careful inspection.

9. Under the said contract Seas Shipping Company, Inc., was in privity with Bethlehem Steel Company.

10. Because of the defect in the said shackle, the "Robin Sherwood" was not of "merchantable quality" when it was sold by Bethlehem Steel Company to the United States Maritime Commission, which in turn sold it to Seas Shipping Company, Inc.

11. Because of the defect in the said shackle, Joseph Sieracki, a stevedore, was injured on December 23rd, 1942.

REQUESTS FOR CONCLUSIONS OF LAW AS TO THIRD PARTY DEFENDANT BETHLEHEM STEEL COMPANY

1. The warranty of merchantable quality as provided in the Uniform Sales Act is applicable to this transaction.

2. The shackle in question was not of merchantable quality.

3. The guarantee period of six months mentioned in Article 15 of the Contract between Bethlehem Steel Company and United States Maritime Commission must be limited to its express terms and it is not a limitation upon a claim for breach of the warranty of merchantable quality under the facts of this case.

4. Bethlehem Steel Company is liable to Seas Shipping Company, Inc., for the full amount of the damages awarded to the Plaintiff, Joseph Sieracki, plus counsel fees and costs.

Respectfully submitted, Krusen, Evans & Shaw, Attorneys for Original Defendant.

[fol. 148] IN UNITED STATES DISTRICT COURT

Request of Bethlehem Companies for Findings of Fact and Conclusions of Law

This cause having been submitted to the Court for decision upon the merits, the defendants and third-party defendants, Bethlehem Steel Company and Bethlehem-Sparrows Point Shipyard, Inc., by their counsel, Philip H. Strubing, Esq., respectfully request the Court to make and enter the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

a. Findings With Respect to Plaintiff's Case Against Seas Shipping Company, Inc.

1. Plaintiff was employed by Atlantic and Gulf Stevedores, Inc., as a stevedore, and, in such capacity, boarded the S. S. Robin Sherwood on December 23, 1942, at Pier 98 South Wharves, Philadelphia, Pennsylvania, for the purpose of loading cargo. Seas Shipping Co., Inc. (hereinafter referred to as Seas Shipping) owned the S. S. Robin Sherwood on said date. Plaintiff was stationed at No. 5 hatch on said vessel, and instructed by Atlantic and Gulf Stevedores, Inc., to operate the winch which controlled the topping lift of the 10-ton boom at said hatch.

2. Thereafter, plaintiff assumed his duties as winchman and, with other employees of Atlantic and Gulf Stevedores, Inc., commenced loading cargo on board the S. S. Robin Sherwood. During the loading of an 8-ton draft, the shackle attached to the topping lift block at the end of the aforesaid boom parted, causing the boom to fall and strike plaintiff, resulting in injuries to the plaintiff. The accident was caused solely by the parting of the shackle.

3. Damages sustained, and to be sustained, by plaintiff amount to $9,500.

4. The S. S. Robin Sherwood was constructed for the United States Maritime Commission (hereinafter referred [fol. 149] to as the Commission) partly by Bethlehem Steel Company (hereinafter referred to as Bethlehem) and partly by Bethlehem-Sparrows Point Shipyard, Inc. (hereinafter referred to as Sparrows Point). Certain booms and tackle

were installed upon the S. S. Robin Sherwood by Sparrows Point with knowledge that said gear would be used by stevedores for the purpose of loading and unloading the vessel.

5. There is no evidence that the shackle which parted on December 23, 1942, was a shackle which was installed on the S. S. Robin Sherwood by Sparrows Point.

6. The shackle which broke on December 23, 1942, was defective in that a cavity or "pipe" had formed in the center of the metal at the top of the shackle bow, from which a crack or seam extended to the top and bottom outer surfaces of the shackle bow at approximately the middle of the "U" formed by the shackle bow. Said pipe and crack were formed either at the time of manufacture of the original bar of steel from which the shackle was subsequently forged or at the time the shackle was forged. None of the defendants in this case took any part in or had any connection with either the manufacture of the steel bar or the forging or galvanizing of the shackle. Neither the pipe nor the crack in said shackle was visible upon examination of the exterior of the shackle at any time after the shackle was forged and galvanized, and said pipe and crack would have been revealed only by a metallurgical test performed by an expert metallurgist. The shackle was not "doctored" at any time, in any manner, in an attempt to conceal a defect.

7. Following the installation of the 10-ton boom and tackle at No. 5 hatch of said vessel, the boom and tackle were tested by Sparrows Point in accordance with the usual and customary method of testing booms and lifting gear followed by reputable shipyards throughout the United States. The test consisted of appending to the boom a [fol. 150] weight of 12½ tons, lifting the weight, swinging it across the ship, dropping it in the hold, raising it, and placing the weight again at the starting position. This test was conducted under the supervision and in the presence of representatives of the Commission.

8. Following the test all items of the lifting gear of the 10-ton boom at the No. 5 hatch of the vessel were examined by a competent person on behalf of Sparrows Point, and found to have withstood the test load without deformation and found to be free from cracks, flaws and other defects.

9. A representative of Seas Shipping was present at the boom test and examination hereinbefore described.

10. Sparrows Point acted in a prudent and careful manner, in conducting the boom test and examination of lifting gear hereinbefore described.

11. On July 16, 1941, the vessel, under the name of S. S. Robin Sherwood, was delivered by Bethlehem to the Commission and, on the same day, delivered by the Commission to Seas Shipping.

12. At the time of delivery of said vessel by Bethlehem to the Commission and by the Commision to Seas Shipping, there was also delivered to the Commission, and in turn to Seas Shipping, a certificate which stated that the boom test and examination hereinbefore described had been made.

13. The S. S. Robin Sherwood was in use and operation from July 16, 1941, to December 23, 1942.

b. Findings With Respect to Plaintiff's Case Against Bethlehem Steel Company and Bethlehem-Sparrows Point Shipyard, Inc.

14. Paragraphs 1 through 6 hereof, inclusive, are hereby incorporated herein with the same force and effect as if herein again set forth in full.

[fol. 151] 15. There is no evidence as to what inspections or tests are usually or customarily made upon such shackles in shipyards generally.

16. There is no evidence that the shackles installed upon the vessel by Sparrows Point were not inspected and tested.

17. Neither Bethlehem nor Sparrows Point was negligent in the construction of the S. S. Robin Sherwood or in the installation thereon of booms and tackle.

18. Neither Bethlehem nor Sparrows Point was required, in the exercise of reasonable care, to make or have made a metallurgical test upon booms and tackle installed upon the vessel.

c. Findings with respect to Seas Shipping Company, Inc.'s case against Bethlehem Steel Company and Bethlehem-Sparrows Point Shipyard, Inc.

19. Paragraphs 1 through 13 hereof, and paragraphs 17 and 18, inclusive, are hereby incorporated herein with the same force and effect as if herein again set forth in full.

20. The S. S. Robin Sherwood was constructed at Sparrows Point, Maryland. The vessel was constructed pursuant to an agreement dated September 25, 1939, between the Commission and Bethlehem. Construction thereof was commenced by Bethlehem on October 10, 1940, and continued by it to June 3, 1941, and was completed by Sparrows Point from June 3, 1941, to July 16, 1941, pursuant to contract between said corporations dated June 3, 1941, under which Sparrows Point acted as an independent contractor.

21. The contract between the Commission and Bethlehem, dated September 25, 1939, provided, in substance, that Bethlehem should provide the work, labor and materials for the construction of the vessel according to detailed plans [fol. 152] and specifications to be supplied by the Commission and subject to extensive inspections and tests to be made under the supervision of the Commission. The contract further provided that title to all materials, equipment, supplies, and all other property assembled at Bethlehem's plant or elsewhere for the purpose of being used for the construction of the vessel, should be vested in the Commission immediately upon being so assembled, and that title to the vessel itself should be vested in the Commissison immediately upon the commencement of construction.

22. On April 4, 1940, the Commission and Seas Shipping entered into an agrement pursuant to which Seas Shipping agreed to purchase the vessel from the Commission.

23. From September 25, 1939, until the delivery of the vessel to the Commission, George C. Sharp, Naval Architect, was authorized to, and did act as the agent and representative of the Commission to prepare and approve all plans, specifications and drawings in connection with the vessel and to supervise the construction thereof to the extent of assuring that such construction conformed to such plans, specifications and drawings, and all requirements of the Commission.

24. The specifications for the vessel, as approved by George C. Sharp, specified that the topping lift block, including shackle, at the end of the 10-ton boom on said hull

should be as shown in the catalogue No. 95 of W. H. McMillan's Sons, p. 556, figure 4585, or equal, with a distance between the center of the shackle pin and the center of the shackle bow wire of 12 inches; and that said block, including shackle, should be galvanized.

25. On June 2, 1941, Bethlehem purchased from W. H. McMillan's Sons a block, including galvanized shackle, identical with that shown in W. H. McMillan's Sons catalogue No. 95, p. 556, figure 4585, with a distance between [fol. 153] the center of the shackle pin and the center of the shackle bow wire of 12 inches. The block, including shackle, so purchased was painted and installed by Sparrows Point at the boom end of the 10-ton boom at the main mast of the vessel.

26. The letter from Seas Shipping to Sparrows Point, dated May 25, 1943, did not constitute reasonable notice to Bethlehem of the claim of breach of implied warranty subsequently made by Seas Shipping against Bethlehem.

27. Seas Shipping failed to give notice to Bethlehem of any alleged breach of warranty within a reasonable time after December 23, 1942, when Seas Shipping acquired knowledge of the defective condition of the shackle which caused the accident.

Conclusions of Law

1. This Court has jurisdiction of this cause.

2. Seas Shipping, Sparrows Point and Bethlehem were not negligent.

3. Upon the evidence produced by plaintiff in support of his amended complaint against Sparrows Point, Sparrows Point is entitled to judgment in its favor, with costs.

4. Upon the evidence produced by plaintiff in support of his amended complaint against Bethlehem, Bethlehem is entitled to judgment in its favor, with costs.

5. The transaction and contract between Bethlehem and the Commission did not constitute a sale of goods or a contract to sell goods within the meaning of the Uniform Sales Act, and said transaction and contract were not covered by said Act.

6. In asserting a claim against Sparrows Point and Bethlehem upon the basis of Section 15 of the Uniform Sales Act, Seas Shipping failed to comply with Section 49 of said Act.

[fol. 154] 7. On the claim of Seas Shipping against Sparrows Point, Sparrows Point is entitled to judgment in its favor, with costs.

8. On the claim of Seas Shipping against Bethlehem, Bethlehem is entitled to judgment in its favor, with costs.

Respectfully submitted, Philip H. Strubing, Counsel for Bethlehem Companies.

May 16, 1944.

IN UNITED STATES DISTRICT COURT

OPINION

Sur Pleadings and Proof

Before KIRKPATRICK, J.:

This is a civil action, on the law side, brought by a longshoreman, originally against the Seas Shipping Co., Inc., owner of the Robin Sherwood, to recover damages for injuries received while engaged in loading that vessel. The Seas Shipping Co., impleaded the two Bethlehem Companies and the plaintiff then amended his complaint to include a cause of action against each of the two third-party defendants. The trial was to the court with a jury, but before the testimony was completed it was stipulated that the plaintiff's damages were $9,500.00 and that the court should determine liability as though a jury trial had been waived at the outset.

The plaintiff, in his brief, has correctly stated the basic facts as follows:

The defendant, Bethlehem Steel Company, was awarded a contract by the United States Maritime Commission to build the steamship Robin Sherwood. That company subsequently sublet a portion of the job to the defendant, Bethlehem Sparrow's Point Shipyard, Inc. The latter undertook to assemble and install on the vessel, among other

things, certain cargo gear and particularly, the ten-ton boom and tackle at number 5 hatch.

[fol. 155] Upon completion of the vessel in June of 1941, the ten-ton boom was tested by lifting a dead weight of twelve and a half tons, and the vessel was then turned over to the defendant, the Seas Shipping Co., Inc., which had purchased it from the Maritime Commission.

The vessel was in service approximately eighteen months when it called at the port of Philadelphia on December 23, 1942, to load parts of freight cars for shipment abroad. The plaintiff was one of a number of longshoremen who were engaged to load the cargo into the vessel. After rigging the gear on the ten-ton boom, which had never been used up to this time, the longshoremen lowered one piece of freight into the hold of the ship and were engaged in stowing away the second part of the freight car, the weight of which was not in excess of 8.2 tons, when the shackle which supported the ten-ton boom broke, causing the boom and tackle to come down and injure the plaintiff.

I

The plaintiff's case against Seas Shipping Co., Inc.

The plaintiff must show negligence according to the rules of the principles of the maritime law, and the decisions of the federal courts, not those of Pennsylvania, are controlling.

Concededly the Jones Act does not apply, the plaintiff's suit not being against his employer. The New Brooklyn, 37 F. Supp. 955; Kwasizur et al. v. Dawnic S. S. Co., et al., 25 F. Supp. 327. The plaintiff was injured on a ship lying in navigable waters and while he was engaged in the performance of a maritime service and the wrong which is the subject of the suit is a maritime tort. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 61. The court has jurisdiction either in admiralty or on the law side, Murray v. Pacific Coast S. S. Co., 207 Fed. 688.

The plaintiff asks the court to find that the accident occurred by reason of unseaworthiness of the vessel and I make that finding, but his contention that this fact alone [fol. 156] entitles him to recover against the owner cannot be sustained. If he were a seaman in the employ of a vessel he would, of course, be entitled to a verdict on that showing alone. The Osceola, 189 U. S. 158. But he is not a seaman,

not a member of the crew of the vessel. What was decided in International Stevedoring Co. v. Haverty, 272 U. S. 50, and Uravic v. Jarka Co., 282 U. S. 234, was that *in the Jones* Act the word "seaman" was intended by Congress to include a longshoreman. It has never been decided that longshoremen are seamen generally and, in fact, the Court in the Haverty case pointed out "that for most purposes, as the word is commonly used, stevedores are not 'seamen.'"

This leaves the plaintiff standing upon the general maritime law of tort. "This means, as we indicated, (by) the law of the United States, with the provisions of Sec. 33 left out." Uravic v. Jarka, supra. The maritime law makes shipowners liable to third persons properly on board as invitees, including stevedores, if they are injured through the fault or negligence of the shipowner, but not otherwise. The Howell, 273 F. 513; Jeffries v. DeHart (Third Circuit) 102 F. 765.*

The measure of the shipowner's duty is reasonable care. In the present case the particular duty of care involved is the duty to inspect the ship's equipment, and liability depends upon whether the shipowner exercised the degree of care in this respect which the maritime law imposes upon him.

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* In Jeffries v. DeHart, supra, the court said, "the same problems apply as would have applied if it had happened upon the land and recovery had been sought in a common law action." That statement, however, was made before the Supreme Court decided the Uravic case, supra, in which it held that the cause of action was a maritime tort. It was also made before the Supreme Court of Pennsylvania decided the case of Ebbert, et al. v. Philadelphia Electric Co., 330 Pa. 257, in which that court made a marked departure from the generally accepted rule as to vendors' duty of inspection on sales of chattels. (See Vendors' Tort Liability, 89 U. of Pa. Law Review 306.) I do not think that the court meant by its statement that the law of Pennsylvania governed, but merely that at the time the statement was made there was no difference between it and the general law of maritime tort.

At this point further detailed fact findings are necessary and I make them as follows:

[fol. 157] The shackle was a forged U-shaped bar of mild steel about one and three-quarter inches in diameter, pierced at the two ends to take a cross-bar. The defect which caused it to break was a cavity known as a pipe, located in the center of the bar just at the bend of the U extending longitudinally a distance of possibly three-quarters of an inch. From this pipe a crack or seam, also longitudinal, extended to the outer surface of the U at the crown or bend. The separation or parting line at the surface of the shackle was "a couple of thousandths of an inch wide"—an estimate which I accept in default of accurate instrumental measurements. The defect occurred in the course of forging the shackle. After forging, as part of the process of manufacture, the entire shackle was galvanized. Before it came into the hands of any of the defendants, it was painted. It is unlikely that the crack was visible to the naked eye, even without galvanizing or painting, but certainly when the shipowner got the shackle as part of the ship's equipment it had been effectively concealed and was entirely invisible. I find further, not only from the testimony but from my own examination of the shackle, that its surface was not perfectly smooth anywhere and that there was no exceptionally large raised area at the line of the fracture which would call attention to it or which is noticeably different from other unevennesses on its surface. The crack was not welded after forging nor "doctored" in any way and there was nothing on its surface to suggest that it had been. To sum up, when the ship was turned over to the Seas Shipping Co., no visual inspection of the shackle, however close, would have disclosed anything to indicate that it was defective.

When the Seas Shipping Co., received the ship it was furnished with certificates from the United States Maritime Commission and the shipbuilder which certified that the gear, including the shackle here involved, had been tested with a load 25 percent in excess of its rated capacity of ten long tons and had been carefully examined after the [fol. 158] test and before delivery of the vessel on July 16, 1941. In addition, Captain Bonn of the Robin Sherwood had been present and saw a test (probably the one referred to in the certificates) of the ten-ton boom at which it raised

twelve and one-half tons. After the gear was disassembled for examination, it was reassembled on the ship and it had not been tested between that time and the day of the accident. From the certificate and specifications the master knew that the shackle was a product of a reputable manufacturer and had been installed by a responsible and competent shipbuilder.

During the 18 months prior to the accident the shackle, as well as other parts of the equipment, was properly cared for and was not allowed to rust or deteriorate. It was also inspected visually, the last time being two to four weeks before the accident. While this inspection was not close, the fact is that the most meticulous visual inspection would not have disclosed any defect.

The pipe would undoubtedly have shown up under an X-ray examination, though there is no evidence that the crack would. The crack could have been discovered if its location could have been divined and the bar at that point had had the paint removed by a solvent, given an acid bath and etched by a process which constitutes a metallurgic test, known as deep-etch or macro-etch. This process was actually applied to the shackle during the trial, and after all the steps had been taken, the crack was barely visible.

The plaintiff does not seriously argue that the law required the shipowner to apply either of these tests to the shackle and similar equipment. He does, however, contend that the shackle should have been suspended by a wire, struck with another piece of metal, and the sound given out observed, and that failure to do this constituted negligence. There was evidence that a test of this kind is customary in shops where articles of this character are manufactured. There is no testimony to the effect that it is ever used anywhere else, or that shipowners in practice [fol. 159] ever disassemble ship's gear and equipment and apply it. As described by the plaintiff's witness it involves hanging up a number of pieces of the same size and contour and striking them, in which case if any one of them gives out a different note, it is cause for suspicion. I do not think that the law requires a shipowner to provide himself with several pieces of equipment duplicating each part of his ship's gear, in order to apply this test.

The plaintiff's expert testified that, even without other pieces to use as a standard, tapping a piece such as the one in question will produce a dull sound which will reveal that

it is defective, "if the fracture is bad and if it is transverse" and he further said that, in his opinion, this particular shackle would have given a dull sound. Of course, it may be accepted that if a crack is very large it will cause the bar to give a dull instead of a ringing sound. Parenthetically, the crack in this shackle was longitudinal, not transverse and, of course, any fracture in a shackle is bad in one sense. I do not, however, accept the testimony of the plaintiff's expert that this particular shackle with a hair line crack of two one-thousandths of an inch would have given out a tone so noticeably dull as to indicate anything to the listener. He was shown to be so completely wrong in his very definitely expressed opinion that the crack had been doctored and a layer of metal added and the whole welded with an acetylene torch, that I am unwilling to accept his guess at the kind of sound which this particular shackle, before it was broken apart, would have given out. Rejecting his opinion, I find that there is no evidence to the effect that, striking this shackle, by itself and without others like it for comparison, with a piece of metal would have disclosed anything wrong with it.

Nor do I accept the plaintiff's expert's testimony to the effect that the load test of twelve and one-half tons given to the boom and tackle was inadequate. The fact is that it was conducted under the supervision and in the presence of representatives of the United States Maritime Com- [fol. 160] mission and in accordance with the usual and customary method of testing booms and lifting-gear followed by reputable shipyards throughout the United States. Even had it been tested at seventeen and one-half tons as the expert thought it should have been, it would be a pure guess to say that it would have failed in any way. It was designed to lift ten tons, with a breaking point at forty tons and a yielding or distortion point of twenty tons.

But apart from the fact question and assuming that the shackle, if suspended and tapped, would have given out a suspicious sound, I am of the opinion that under the circumstances of this case the shipowner was not required by law to make such a test or to do more than he actually did. The question involves the extent to which a shipowner, who is not the builder of the ship nor the manufacturer of its gear, is under an affirmative duty to discover unknown and invisible defects in a ship's equipment.

No doubt a high degree of diligence is prescribed, and rightly so, but it all comes down to what is reasonable under the circumstances. The law cannot require a man to take more care than is reasonable to prevent risks inherent in his conduct, without making him an insurer. There is no intermediate measure of duty, and it is well-settled that the responsibility of a shipowner to invitees is not that of an insurer. Without attempting to lay down a general rule, I think that a shipowner is not negligent in permitting the use of the ship's equipment by stevedores in a case in which the particular portion which failed was known to the shipowner to have come from an established and reliable dealer in maritime supplies and where, in the presence of the master of the vessel as well as representatives of the Maritime Commission, the equipment was subjected to a standard test prescribed by the Commission and demonstrated to be capable of safely performing under a load 25 percent greater than that for which it was designed and 50 percent greater than that under which it finally failed, in which the equipment was adequately cared for at all times [fol. 161] and visually inspected a few weeks before its failure—all this, it being understood, being in the case of an internal defect in a bar of steel which was invisible on the surface.

The case of the Tresco (Third Circuit) 134 F. 819, decided by a divided court, strongly relied on by the plaintiff, goes to the extreme limit and puts a heavier duty on the shipowner than does any case of which I know, but I would have to go much further than it goes to declare this defendant liable. In the Tresco case, supra, it was held that a shipowner was bound to remove the tarred twine covering from a spliced cable to see that the splicing was properly done. Perhaps under the circumstances of that case that was not requiring as much as the bald statement would indicate. So far as the record showed no one knew who manufactured the cable or who had spliced it or from whom it was purchased. There was no evidence that it had ever been tested or that it had ever been subjected to any strain such as that under which it broke. Under such circumstances one might well hesitate to say that it was unreasonable to hold that a "very superficial" visible inspection of the cable was a sufficient performance of the duty of care.

II

The plaintiff's case against the Bethlehem Companies, the third-party defendants.

The case against the Bethlehem Companies stands on a very different footing from that against the shipowner although the measure of their duty and responsibility to the plaintiff, namely, reasonable care, is the same. Bethlehem Sparrow's Point was a subcontractor which installed the defective equipment and was in substantially the same position as the manufacturer. Reasonable care on the part of one who manufactures a thing which, if defective is capable of causing extensive damage and great injury, is a far more exacting duty than that of one who, having bought it, permits others to use it.

[fol. 162] There is no question that, in this case, the shackle was defective when it came into the hands of Bethlehem Sparrow's Point and when it was installed as part of the cargo gear of the vessel. Siegrocinsky v. Du Pont, 118 F. (2d) 531, cited by the defendants, is not in point. In that case the whole question was whether the circumstances of the accident, taken in connection with the character of the instrumentality (a dynamite cap) which caused the injury afforded any evidence that the defect must have occurred in the course of manufacture. This Court thought that the evidence excluded the possibility of its having occurred anywhere else. The Circuit Court of Appeals held that it did not and that, therefore, the manufacturer could not be held responsible.

The case against the Bethlehem Companies is still one of maritime tort. In Atlantic Transport Co. v. Imbrovek, supra, the court said, "If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation and to commerce on navigable water, was quite sufficient." Nevertheless the principles of McPherson v. Buick Motor Co., 217 N. Y. 382, are broadly applicable. The law of that case has become so widely accepted as to be a part of the general law of torts, maritime as well as common law.

The only question as to these defendants is whether the plaintiff has met the burden of proof of showing negligence. Concededly there is no direct testimony of the effect that these defendants did not make tests other than the lifting

test at the weight of twelve and one-half tons, which was made when the ship was delivered to the purchaser.

These defendants are shipbuilders on a large scale and it is to be assumed that they have adequate and complete plant and equipment, including forge and metal shops, as well as experts familiar with metals and all the practices of forge shops and are expert in the examination and test- [fol. 163] ing of metals. A measure of diligence in searching for and discovering defects which would be entirely unreasonable in case of a shipowner, might quite properly be exacted from the builder. It is undisputed that the X-ray test would have disclosed this defect. Perhaps that is more than should be required, but this particular shackle was a key piece in the largest boom on the ship and a link, the breaking of which might cause as much or more damage as that of any other piece of steel on the ship. However that may be, I am satisfied and so find, that the test, by tapping or striking with a piece of metal, if performed as the plaintiff's expert said it should be—that is, by suspending a number of pieces of the same size and contour and striking one after the other and comparing the tone given out—would have disclosed, to the ear of an expert, something which would have put him on notice.

On the basis of this fact finding, the plaintiff has met his burden. If the test would have disclosed the defect, then either it was not made, or if made, was negligently conducted or else the shackle was installed with knowledge of its weakness.

The Bethlehem Companies are not protected by the name and reputation of the concerns by which the equipment was manufactured and sold. No builder of structures, vehicles or mechanisms which may cause injury by failure of parts is—that is the whole point of McPherson v. Buick, supra,—unless, perchance, there is no conceivable test or inspection within the bounds of reason which could disclose a defect. The Bethlehem Companies' argument on this point, reduced to its simplest terms, is in reality a denial of the doctrine of McPherson v. Buick.

Counsel for the Bethlehem Companies argues that the plaintiff has failed to show that the shackle which broke at the time of the accident was the same shackle installed on the vessel before its delivery to the Seas Shipping Co.

It was stipulated that on June 2, 1941, Bethlehem Steel Company purchased a block including a galvanized shackle,

[fol. 164] and that the block including shackle was painted and installed by Bethlehem Sparrow's Point, Inc., at the boom end of the ten-ton boom at the main mast of Hull 4350 (The Robin Sherwood).

Captain Bonn, who joined the vessel sometime before her delivery to the owners and remained with her continuously to the date of the accident, testified that the ten-ton boom was never used for any lifts from the time of the test (prior to the turning over of the ship to the Seas Shipping Co., on or about July 15, 1941) to the date of the accident, on December 23, 1942. On being shown the broken shackle, which had been produced in court, he testified that it was the same one which was on the boom at the time of the accident. His testimony then proceeded, "Q. Now, on the occasion that *this* tackle was used prior to this accident, who rigged the tackle? A. The riggers from the Bethlehem Shipbuilding Company. Q. I mean just prior to the accident? A. Oh, prior to the accident, the longshoremen. Q. This is on December 23, 1942? A. Oh, the longshoremen rigged the gear." This taken in connection with his testimony as to the position in which the boom was carried and that of Acker, the mate, as to routine inspections and lubrication, neither of whom referred to any replacement of equipment, is sufficient to warrant a finding that the shackle installed by the Bethlehem Sparrow's Point Co., Inc., was the same shackle which caused the accident.

Even without this testimony, however, if the Bethlehem Companies wanted to avail themselves of the defense that the shackle might have been changed, the burden was upon them to show it. This is a type of equipment that is quite permanent in nature. It appears that, after the first test with the weights, the boom was put in a vertical position and remained in that position until the day of the accident. With the exception of routine visual inspections there is no evidence that this particular boom received any attention. [fol. 165] After the test it was not used at all until the date of the accident. Under these circumstances, unless evidence to the contrary is introduced, the court may and will conclude that the shackle installed by the Bethlehem Sparrow's Point Co., Inc., was the same one which parted on December 23, 1942 and caused the injuries complained of.

It is a general rule that a prior existence or condition is evidential of a later one unless the contrary is shown.

See 22 C. J. 86. Considering the circumstances here, the lapse of time does not destroy the probative force of the inference (sometimes called "presumption") of continuance. See Insurance Co. of Liverpool v. Nebraska Storage Warehouses, 96 F. (2d) 30, 36; Berwind White Coal Mining Co. v. City of New York, 48 F. (2d) 105, 106; Wigmore, On Evidence, Sec. 437.

The close relationship of these two companies makes it unnecessary to determine or apportion the liability as between them. I hold that they are both liable and judgment may be entered accordingly.

Answers to Requests

The statements of fact contained in the foregoing opinion may be taken as special findings and the statements of law as conclusions of law. In accordance with the rule I also state the following conclusions of law separately.

Plaintiff's Requests for Findings of Fact

I affirm requests Nos. 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, (modified to the extent that the galvanizing and painting entirely concealed any surface indication of the crack), 13, 15, 19 and 21.

I deny requests Nos. 16, 22, 23 and 24.

Requests Nos. 6, 14, 17 and 18 are answered by the general finding that the Bethlehem Companies failed to meet the duty of care required of them as manufacturers of the vessel and that the Seas Shipping Co., did meet the duty of care which the law imposes upon it.

[fol. 166] As to request No. 20, I find that there is no evidence that tapping the shackle by itself, would have disclosed the defect. There is evidence which I accept that, had the shackle been hung with others of the same size and shape and tested in that manner by an expert the defect could have been noticed.

Plaintiff's Requests for Conclusions of Law

I affirm requests Nos. 1, 2 (with the qualification that the company should have used the utmost precaution reasonable under the circumstances).

Request No. 3 is answered by the general fact finding that the Bethlehem Companies were negligent.

Request No. 4 is affirmed.

Requests Nos. 5 and 6 are correct statements of the general law as applied to seamen but do not apply to this plaintiff.

Request No. 7 is denied.

Request No. 8 is affirmed and No. 9 is affirmed so far as it relates to the duty to make reasonably proper examinations.

Request No. 10 is denied.

Request No. 11 is affirmed as regards to the Bethlehem Company but is denied as in respect to the two shipping companies.

Original Defendant's Requests

Findings of Fact

I affirm requests Nos. 1, 2, 3, 4, 5, 6, 7, (with the qualification that it might have been discovered by the striking test, if conducted by an expert in conjunction with other shackles).

I affirm requests Nos. 8, 9, 10, 11, 12, 13 and 14.

Requests for Conclusions of Law

I affirm requests Nos. 1, 2, 3 and 4.

The remaining requests need not be answered in view of the holding that the Seas Shipping Co., is not liable.

[fol. 167] Requests of Third-Party Defendants for Findings of Fact

I affirm requests Nos. 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, (as modified by the statements of fact in the opinion).

I deny requests Nos. 5 and 17.

Requests Nos. 19 to 27 inclusive need not be answered in view of the holding with the Seas Shipping Co., as not liable.

Requests for Conclusions of Law

I affirm request No. 1.

I deny requests Nos. 2, 3 and 4.

Requests Nos. 5 to 8 need not be answered.

Judgment may be entered in favor of the plaintiff against Bethlehem Steel Company and Bethlehem Sparrow's Point Shipyard, Inc., in the amount of $9,500 with interest.

[fol. 168] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8706

JOSEPH SIERACKI

vs.

SEAS SHIPPING CO., INC., Defendant and Third Party Plaintiff

vs.

BETHLEHEM STEEL CO. and BETHLEHEM SPARROWS POINT SHIPYARD, INC., Third-Party Defendants-Appellants

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

And now, to-wit: this 13th day of February A. D. 1945, it is ordered that Hon. John J. Parker, U. S. Circuit Judge, for the Fourth Circuit, and Hon. Guy K. Bard, District Judge, for the Eastern District of Pennsylvania, be, and they are hereby assigned to sit in above case in order to make a full court.

Goodrich, Circuit Judge.

Endorsements: Order Assigning Hon. John J. Parker & Hon. Guy K. Bard for Argument Received & Filed Feb. 13, 1945. William P. Rowland, Clerk.

[fol. 169] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8722

JOSEPH SIERACKI, Plaintiff-Appellant,

vs.

SEAS SHIPPING CO., INC., Defendant and Third Party, Plaintiff-Appellee

vs.

BETHLEHEM STEEL CO. and BETHLEHEM SPARROWS POINT SHIPYARD INC., Third-Party Defendants

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

And now, to-wit: this 13th day of February A. D. 1945, it is ordered that Hon. John J. Parker, U. S. Circuit Judge,

for the Fourth Circuit, and Hon. Guy K. Bard, District Judge, for the Eastern District of Pennsylvania, be, and they are hereby assigned to sit in above case in order to make a full court.

Goodrich, Circuit Judge.

Endorsements: Order Assigning Hon. John J. Parker & Hon. Guy K. Bard for Argument Received & Filed Feb. 13, 1945. William P. Rowland, Clerk.

[fol. 170] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8706

JOSEPH SIERACKI

vs.

SEAS SHIPPING CO., INC., and BETHLEHEM SPARROWS POINT SHIPYARD, INC., BETHLEHEM STEEL COMPANY, Appellants

OCTOBER TERM, 1944

No. 8722

JOSEPH SIERACKI, Appellant,

vs.

SEAS SHIPPING CO., INC., and BETHLEHEM SPARROWS POINT SHIPYARD, INC., BETHLEHEM STEEL COMPANY

And afterwards, to wit, the 13th day of February, 1945, come the parties aforesaid by their counsel aforesaid, and these cases being called for argument sur pleadings and briefs, before the Honorable John J. Parker and Honorable Herbert F. Goodrich, Circuit Judges, and Honorable Guy K. Bard, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 11th day of April, 1945, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 171] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8706

JOSEPH SIERACKI

v.

SEAS SHIPPING CO., INC.,

and

BETHLEHEM SPARROWS POINT SHIPYARD, INC., BETHLEHEM STEEL COMPANY, Appellants

OCTOBER TERM, 1944

No. 8722

JOSEPH SIERACKI, Appellant,

v.

SEAS SHIPPING CO., INC.,

and

BETHLEHEM SPARROWS POINT SHIPYARD, INC., BETHLEHEM STEEL COMPANY

Appeals from Judgments of the District Court of the United States for the Eastern District of Pennsylvania

Before Parker and Goodrich, Circuit Judges, and Bard, District Judge

OPINION OF THE COURT—Filed April 11, 1945

By GOODRICH, Circuit Judge

This is an action for personal injuries. Plaintiff, a longshoreman, sued on the law side, Seas Shipping Co., Inc., [fol. 172] owner of the steamship, Robin Sherwood, to recover damages for injuries he sustained while loading the vessel. Seas Shipping Co. impleaded the two Bethlehem companies whose connection with the facts is described below. The plaintiff then amended his complaint to include the claim against each of the two third-party defendants. The trial was to a court with a jury but before the testimony

was completed it was stipulated that the plaintiff's damages were $9,500 and that the court should determine liability as though a jury trial had been waived at the outset. The District Court decided in favor of the plaintiff against the Bethlehem companies and in favor of Seas Shipping Co., Inc. The plaintiff appeals, at No. 8722, from the judgment against him and in favor of Seas Shipping Co., Inc. The Bethlehem companies, at No. 8706, appeal from the judgment against them in favor of the plaintiff. The appeals were heard together. The following statement of the basic operative facts is taken from the opinion of the Court below:

> The defendant, Bethlehem Steel Company, was awarded a contract by the United States Maritime Commission to build the steamship Robin Sherwood. That company subsequently sublet a portion of the job to the defendant, Bethlehem Sparrow's Point Shipyard, Inc. The latter undertook to assemble and install on the vessel, among other things, certain cargo gear and particularly, the ten-ton boom and tackle at number 5 hatch.
>
> Upon completion of the vessel in June of 1941, the ten-ton boom was tested by lifting a dead weight of twelve and a half tons, and the vessel was then turned over to the defendant, the Seas Shipping Co., Inc., which had purchased it from the Maritime Commission.
>
> The vessel was in service approximately eighteen months when it called at the port of Philadelphia on December 23, 1942, to load parts of freight cars for [fol. 173] shipment abroad. The plaintiff was one of a number of longshoremen who were engaged to load the cargo into the vessel. After rigging the gear on the ten-ton boom, which had never been used up to this time, the longshoremen lowered one piece of freight into the hold of the ship and were engaged in stowing away the second part of the freight car, the weight of which was not in excess of 8.2 tons, when the shackle which supported the ten-ton boom broke, causing the boom and tackle to come down and injure the plaintiff.

I. Liability of the Bethlehem Companies

The Bethlehem Steel Company constructed the ship on contract with the United States Maritime Commission,

which in turn sold it to Seas Shipping Co. Bethlehem Sparrows Point Shipyard, Inc. was a sub-contractor which installed the defective equipment. As the Court below stated, the case is one of maritime tort. Atlantic Transport Company of West Virginia v. Imbrovek, 234 U. S. 52 (1914). Nevertheless, the principles in MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916) are broadly applicable, that law having become so widely accepted as to be construed as a part of the general law of torts, maritime as well as common law. They are summed up in Restatement, Torts § 395 as follows:

> "A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured."

[fol. 174] That the appliance here in question was one concerning which great precautions were necessary in order to comply with the requirements of reasonable care is clear. It is found as a fact that the defendants all knew that the shackle in question was to be used to support the ten-ton boom. The failure of this shackle to support the boom and any load which it might at the time be hoisting would thereby endanger human life as well as property. It is equally clear that plaintiff was one of the persons within the ambit of the protection of the duty imposed when he was assisting to load the ship. He was engaged in the very thing for which the apparatus was designed and was one of those "whom the supplier should expect to be in the vicinity of its probable use. . . ."

Neither of these points is questioned by the defendants Bethlehem. It is urged, however, that the evidence is insufficient to establish negligence on their part. It appears that the shackle in question was purchased by the Bethlehem companies from the MacMillan Company. The latter company did not manufacture the shackle, but purchased it from some other company whose name has not been dis-

closed. That fact was also present in MacPherson v. Buick Co., supra, and the legal conclusion expressed in that case concerning it is also found in Restatement, Torts § 400. The purchase of this article, which became a component part of the ship, from outside sources does not relieve the defendants from liability as manufacturer.

The argument for the Bethlehem companies stresses the point that they took all the precautions and safeguards customarily used in the shipbuilding industry to guard against defective material and cargo gear purchased from others. But the Court found as a fact that "There is no evidence as to what inspections or tests are usually made upon such shackles in shipyards generally." That seems to us to dispose unfavorably for the Bethlehem companies of the argument that they should not be liable because they followed the common and usual precautions. Furthermore, [fol. 175] even if they had, that would not necessarily excuse them for while usage is relevant in determining whether reasonable care is exercised it is not conclusive in (with one or two exceptions) establishing compliance with the legal standard. Texas and Pacific Railway Company v. Behymer, 189 U. S. 468 (1903); The T. J. Hooper, 60 F. (2d) 737 (C. C. A. 2, 1932), cert. den. 287 U. S. 662 (1932); Bohlen, Francis H., Some Recent Decisions on Tort Liability, 4 Tulane Law Review 370 (1930); 2 Wigmore on Evidence (3d Ed.) § 461.

The trial judge concluded that sufficient care had not been used. He pointed out that an x-ray test would have disclosed the defect (a "pipe" inside the metal) and pointed out that this particular shackle was a key piece on the largest boom on the ship. He also found that a test by tapping or striking with a piece of metal would have disclosed, to the ear of an expert, something which would have put him on notice. This conclusion, as would be expected, was not received with enthusiasm by the Bethlehem companies. Nevertheless, we think it is sound. So far as it appears, the only test to which this shackle was subjected was the lifting test which was made upon the completion of the vessel. The piece of apparatus was critical and the defect in it subjected life and property to great danger. Other and more searching tests, as applied to this particular piece, could have been made. They should have been made in the exercise of reasonable care. The conclusion of the trial judge was correct.

II. Liability of Seas Shipping Co., Inc.

There are two parts to the argument for the plaintiff with regard to liability of the ship owner. The first is based on negligence. The trial judge found the ship owner free from negligence and we agree with him. If there is any liability for negligence upon Seas Shipping Co. it must be because of some failure to inspect this shackle at the time it received the ship from the Maritime Commission. [fol. 176] During the period between its receipt and the accident the shackle, as well as other parts of the ship, was properly cared for and inspected visually. But the fact was found, and we agree with the finding, that the most meticulous visual inspection would not have disclosed any defect.

The Seas Shipping Co. is not guilty of negligence, therefore, unless it failed to use due care to discover the defect in this shackle. It could not have found it by visual inspection. Doubtless it could have been discovered had the owner torn down the various pieces of apparatus on the ship and subjected them to the sound test or the x-ray test or any other test which might have disclosed the defect. We do not think that reasonable care required such effort on the part of the owner. The master of the ship was present when the lifting test was made. The owner purchased the ship from the Maritime Commission which, in turn, had contracted for its construction with a reputable manufacturer. We do not think the buyer, under these circumstances, is required to tear down the thing bought and subject it to independent tests in order to be exercising due care. One can hardly picture the buyer of an automobile taking it to pieces and testing its various component parts to see whether it is safe for an employee to drive. Nor do we think the ship owner is required to either. We agree with the trial judge, therefore, that there was no showing of want of reasonable care on the part of the ship owner.

This leaves us with the last and most difficult question in the case. Granted that no negligence on the part of the ship owner has been shown, is the owner, nevertheless, liable to this longshoreman because the defective shackle made the vessel unseaworthy? The District Court found as a fact that the accident occurred by reason of the unseaworthiness of the vessel. We think it is undisputed

that if the falling boom had hit one of the sailors the injured seaman could have recovered from the ship's owner or the ship, on the basis of breach of warranty of sea- [fol. 177] worthiness, that warranty not being dependent upon a showing of negligence at all. Mahnich v. Southern Steamship Co., 321 U. S. 96 (1944); The H. A. Scandrett, 87 F. (2d) 708 (C. C. A. 2, 1937). Is the longshoreman entitled to this same protection? It is clear that so far as the "warranty" depends upon contract, plaintiff was not a party to a contract with the ship owner. He was employed by the independent stevedore contractor. This does not necessarily settle the question. The term "warranty" used in this connection is a term used to describe a resulting legal liability, not to give a reason for it. The legal liability is not based upon fault, but is in the nature of insurers' liability, rooted in the admiralty law.

What, then, are the reasons for and against the application of the protection against injuries from unseaworthiness to one engaged in loading and stowing a ship's cargo? There is no question that in fact such service is necessary in the performance of the business of the ship. Formerly the work was done by the ship's crew, but owing to the demand for rapidity and special skill it has become a special service, one which has been called "as clearly identical with maritime affairs as are the mariners." And so an injury to a stevedore comes within the classification of a marine tort. Atlantic Transport Company of West Virginia v. Imbrovek, 234 U. S. 52 (1914). It seems, therefore, that when a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the ship owner or a stevedoring contractor should not determine the measure of his rights. This is the very basis on which the Jones Act was held applicable to give redress to an injured stevedore in International Stevedoring Company v. Haverty, 272 U. S. 50 (1926), commented upon in 27 Col. L. Rev. 211. See also Pravic, Administratrix v. F. Jarka Company, Incorporated, et al., 282 U. S. 234 (1931).

On the other hand, the stevedore loading or unloading a ship has only temporary employment thereon and he is [fol. 178] a stranger to the contract between his employer and the ship owner. In so far as peculiar obligations imposed by the admiralty law for the seaman's protection rest upon the fact that the men are bound to the vessel for the

remainder of the voyage, the stevedore does not fall within the reason for the protection given. Thus an injured employee of the contracting stevedore has been denied recovery for maintenance and cure. C. Flanagan & Sons, Inc. v. Carken, 11 S. W. (2d) 392 (Tex. Civ. App. 1928), commented upon in 42 Harv. L. Rev. 820.

It seems to us that the weight of the argument favors an extension of the protection to the stevedore's employee during the period when he is actually engaged upon a ship in the loading or unloading thereof. He is working in marine employment and is subject to all its risks for the time being. The fact that the exigencies of modern commerce have called in additional help for loading and unloading does not make the undertaking any less a marine transaction and rightly subject to the rules of law for the protection of workers who take the risks of such transactions. We do not hold that a stevedore is entitled to everything that a seaman may claim. All we are deciding now is that if he is injured on the ship in the course of unloading or loading the vessel he may have redress for a defect caused by its unseaworthiness.

We have found no decision which gives consideration and discussion to the point now before us. There are statements and assumptions each way. In W. J. McCahan Sugar Refining & Molasses Co. v. Stoffel, 41 F. (2d) 651 (C. C. A. 3, 1930) Judge Woolley says, page 654, "The law regards a longshoreman or stevedore, injured while engaged in maritime service aboard a ship lying in navigable waters, as a seaman with all his peculiar rights and immunities." In Cassil v. United States Emergency Fleet Corporation et al., 289 Fed. 774 (C. C. A. 9, 1923) the court says that a stevedore, injured while loading a ship could hold the owner of the vessel "only on the theory that the vessel was un- [fol. 179] seaworthy in respect to the instrument whereby his injuries were occasioned." On the other hand, there are a number of decisions in which it is either assumed, or stated, without discussion or elaboration, that the duty owed by the ship owner to the employee of the stevedore is only that of reasonable care. In other words, the responsibility is the same as that of any occupier of premises toward a business guest. Panama Mail Steamship Co. v. Davis, 79 F. (2d) 430 (C. C. A. 3, 1935) (in this case the standard of reasonable care as a measure of duty was agreed upon by both sides); Bryant v. Vestland, 52 F. (2d) 1078 (C. C. A.

5, 1931); Luckenbach S. S. Co., Inc., et al. v. Buzynski, 19 F. (2d) 871 (C. C. A. 5, 1927), rev'd on another ground 277 U. S. 226 (1928); The Howell, 273 Fed. 513 (C. C. A. 2, 1921); The Student, 243 Fed. 807 (C. C. A. 4, 1917), cert. den. 245 U. S. 658 (1917); Jeffries et al. v. DeHart, 102 Fed. 765 (C. C. A. 3, 1900); The Mercier, 5 F. Supp. 511 (D. C. Ore. 1933), aff'd 72 F. (2d) 1008 (C. C. A. 9, 1934).

It will be observed that the numerical weight of decision in the lower federal courts seems against the view here expressed, although, as stated above, the point has been assumed rather than concluded as a result of the examination of principle and precedent. The logical trend of the Supreme Court authority is, we think, in favor of extending to the stevedore the rights of a seaman when engaged in marine employment. On principle we think he should have these rights, at least, to the extent called for by the facts of this case and we so decide.

The judgment of the District Court is affirmed as to the Bethlehem companies, No. 8706, and reversed as to Seas Shipping Co., No. 8722.

A true copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 180] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8706

JOSEPH SIERACKI

vs.

SEAS SHIPPING CO., INC., and BETHLEHEM SPARROWS POINT SHIPYARD, INC., BETHLEHEM STEEL COMPANY, Appellants

Present: Parker and Goodrich, Circuit Judges, and Bard, District Judge

On appeal from the District Court of the United States, for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for

the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs, as to the Bethlehem companies.

By the Court, Goodrich, Circuit Judge.

April 11, 1945.

Endorsements: Order Affirming Judgment etc. as to the Bethlehem companies. Received & Filed. Apr. 11, 1945. William P. Rowland, Clerk.

[fol. 181] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1944

No. 8722

Joseph Sieracki, Appellant,

vs.

Seas Shipping Co., Inc., and Bethlehem Sparrows Point Shipyard, Inc., Bethlehem Steel Company, Appellants

Present: Parker and Goodrich, Circuit Judges, and Bard, District Judge

On appeal from the District Court of the United States, for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, as to Seas Shipping Co., Inc.

By the Court, Goodrich, Circuit Judge.

April 11, 1945.

Endorsements: Order Reversing Judgment as to Seas Shipping Co., Inc. Received & Filed Apr. 11, 1945. Wm. P. Rowland, Clerk.

[fols. 179-180] [File endorsement omitted]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed April 26, 1945

[fol. 181] To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

The Petition of Seas Shipping Co., Inc., by its Attorneys, Krusen, Evans and Shaw, respectfully requests this Court to grant a rehearing in the above-entitled matter. When the case was originally argued on February 13th, 1945, there were several points involved, and the proposition that stevedores were not entitled to the benefit of the warranty of seaworthiness, the point upon which the decision of this Court turned, was regarded by counsel for the Petitioner as settled.

The following quotation from an article by Frederic Cunningham in *18 Harvard Law Review 294*, aptly illustrates the Petitioner's position in this case:

> "It surely needs no argument to show that if several different systems of law are being administered in the same jurisdiction each must be confined to and be administered by the Courts undertaking to administer it, or there will be no certainty in the law. * * * *It will not do for a common law court to proceed in accordance with the Admiralty law, nor for an Admiralty Court to proceed in accordance with the common law.* The fact that in the United States the judges who exercise the Admiralty jurisdiction have also common law jurisdiction, makes it somewhat difficult to keep the two systems separate." (Italics ours.)

It is respectfully pointed out that the decision of this Court in the case at bar has not only extended the class of persons to whom a shipowner owes an absolute warranty of seaworthiness, but more important, it has, in a Civil Action, extended a doctrine heretofore applicable only in Admiralty. At page 6 of its Opinion, this Court said:

> "We think it is undisputed that if the falling boom had hit one of the sailors the injured seaman could

[fol. 182] have recovered from the ship's owner, or the ship, on the basis of breach of warranty of seaworthiness, that warranty not being dependent upon a showing of negligence at all. Mahnich v. Southern Steamship Co., 321 U. S. 96 (1944); The H. A. Scandrett, 87 F. (2d) 708 (C. C. A. 2, 1937)."

There is no doubt that, under the decisions cited by the Court and the host of other decisions on the point,[1] an action based solely upon unseaworthiness as opposed to negligence was heretofore cognizable only in Admiralty. It is true that, if one of the sailors on board the Steamship "Robin Sherwood" had been injured in the same accident in which the Plaintiff sustained his injury, the sailor could have recovered from the owner of the ship on the basis of a breach of the warranty of seaworthiness, but he could have availed himself of the doctrine *only in an action in Admiralty.*

Prior to 1920, when Congress passed the Merchant Marine Act, 46 U. S. C. A. 688, et seq., commonly known as the Jones Act, a member of the crew of a Merchant vessel who was injured due to unseaworthiness could maintain an action *only* upon the Admiralty side of the Court. It required the Jones Act to extend to members of the crew the right to maintain a Civil Action against the shipowner and have his rights determined in a Civil Action with a trial by jury. Under that act, it is necessary that the Plaintiff prove negligence,[2] and since there was no negligence on the part of the shipowner in this case, a member of the crew of the Steamship "Robin Sherwood" could not have recovered in a Civil Action under the Jones Act. The warranty of seaworthiness would, however, have been available to him in an Admiralty action. It is for these reasons that we believe this Court has perhaps overlooked in its decision the dis-

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[1] Atlantic Transportation Co. v. Imbrovek, 234 U. S. 52; 34 Sup. Ct. 731; Panama Railroad Co. v. Johnson, 264 U. S. 375; 44 Sup. Ct. 391; The Osceola, 189 U. S. 158; 23 Sup. Ct. 483.

[2] The Federal Employers Liability Act, 45 U. S. C. A. 51 et seq.; Panama Railroad Co. v. Vasquez, 271 U. S. 557; 46 Sup. Ct. 596; Baltimore S. S. Co. v. Phillips, 274 U. S. 316; 47 Sup. Ct. 600.

[fol. 183] tinction between an action in Admiralty and a Civil Action.

The effect of the decisions of this Court in the instant case is to create a special class and extend to it a right which is superior to that granted to members of the crew; that is, the right to bring a Civil Action and to secure its inherent right to trial by jury upon a mere showing of unseaworthiness without negligence. Thus this Court extends to longshoremen rights in excess of those available to seamen who have always been regarded as a specially favored class and as wards of the Admiralty. In Mahnich v. Southern Steamship Co. supra, the Supreme Court, speaking through Mr. Chief Justice Stone, emphasized, we think, that the doctrine of unseaworthiness existed only in Admiralty when he said:

> "*But the admiralty rule* that the vessel is liable to indemnify a seaman for injury caused by unseaworthiness of the vessel or its appurtenant appliances and equipment, has been settled law since this Court's ruling to that effect in the Osceola, 189 U. S. 158." (Italics ours.)

We think it clear, then, that the Plaintiff in the case at bar could have pursued either one of two remedies. He could have maintained an action in Admiralty, or, as he did, proceed upon the Civil side. The Civil Action, being founded upon common law rules, had to be based upon negligence, and this the Plaintiff attempted to prove at the trial. Having so elected and failed, he should not now be permitted to reverse his field, so to speak, and the Court should not base a finding in his favor in a Civil Action upon a doctrine peculiarly inherent in the Admiralty. The doctrine of election has been rigidly enforced in actions commenced by members of the crew. The Courts have compelled them to elect between their rights under the Jones Act based upon negligence and their rights to recover in [fol. 184] Admiralty by reason of the unseaworthiness of the vessel.[3]

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[3] Pacific Steamship Company v. Peterson, 278 U. S. 130; 49 Sup. Ct. 75; Engel v. Davenport, et al., 271 U. S. 33; 46 Sup. Ct. 410; Gambera v. The Emmy, et al., 1940 A. M. C. 834 (not elsewhere reported); reversed on other grounds 132 F. (2) 414.

The importance of the distinction between a proceeding upon the law side as opposed to one in Admiralty is manifest. To mention but a few, contributory negligence would be a complete bar in the one, but would only serve to mitigate damages in Admiralty. Trial before a jury is inherent in the Civil Action, but not in Admiralty. On appeal there is a trial de novo in Admiralty, but the rule in Civil Actions is quite different.

It is not enough to support the decision of this Court to say that, originally, the work of loading cargo was done by members of the crew. Careful examination of the early cases indicates that longshoremen or stevedores were referred to as "landsmen" and "workmen coming on board."[4] It is to be noted, too, that, with the exception of cases brought under the Jones Act against the employer, all of the cases involving stevedores or longshoremen are in Admiralty.

Since the enactment of the Longshoremen's and Harbor Workers' Compensation Act in 1927, 33 U. S. C. A. 901, et seq., the rights of stevedores under the Jones Act have become moot. However, the language of Mr. Justice Holmes in *International Stevedoring Co. v. Haverty*[5] and *Uravic v. F. Jarka Co.*,[6] clearly indicates that longshoremen are not considered as seamen generally, but that Congress, in passing the Jones Act, intended that its benefits should include longshoremen and that they should have the rights extended to seamen under that Act. (It should be borne in mind that the terms "stevedores" and "longshoremen" have the same general meaning and are used interchangeably.)

> [fol. 185] "While Section 33 is construed to give the rights of seaman to stevedores, it does not say or mean that stevedores are to be regarded as seamen on the particular vessel upon which at the moment they happen to be at work. They simply are given the rights of seamen. * * *"[7]

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[4] The Max Morris, 24 Fed. 860; 137 U. S. 1; 11 Sup. Ct. 29; The Ole Olson, 20 Fed. 384; Hughes on Admiralty, Second Edition, § 103.

[5] 272 U. S. 50; 47 Sup. Ct. 19.

[6] 282 U. S. 234; 51 Sup. Ct. 111.

[7] Uravic v. F. Jarka Co., 282 U. S. 234; 51 Sup. Ct. 111.

It is thus clear that it required the Jones Act and the decision of the Supreme Court in the Haverty case, supra, construing that Statute to give stevedores some of the rights of seamen. Even then it applied only to suits by employee against employer and was carefully limited by decisions of the Supreme Court[8] to the special rights under that Act only.

Viewed in this light, we think it is clear that the case of *W. J. McCahan Sugar Refining & Molasses Co. v. Stoffel*[9] relied upon by this Court to support the proposition that there is a division of authority on the question of whether a stevedore is a member of the class entitled to recover on a mere showing of unseaworthiness, is not authority for that proposition. The action there was in Admiralty as modified by the Jones Act, and the Court relied upon International Stevedoring Co. v. Haverty, supra. The Court was thus discussing the effect of a release executed by a *person who was to be considered a seaman under the terms of the Jones Act under which he was proceeding.* The Plaintiff in the case at Bar is proceeding under the common law, and not under the Jones Act. He is not suing his employer and that Act is not applicable.[10]

The Cassil case,[11] also relied upon by the Court, was a libel in Admiralty. That the statement of the Court in that case concerning unseaworthiness is purely dictum is [fol. 186] clearly shown by the later statement that there was no allegation that the accident resulted from the use of any defective appliance of the ship. If the Cassil case is strong authority for any proposition, it is that stevedores are not seamen under the general Admiralty law, whatever may be their status under the Jones Act.

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[8] International Stevedoring Co. v. Haverty, 272 U. S. 51; 47 Sup. Ct. 19; Uravic v. F. Jarka Co., 282 U. S. 234; 51 Sup. Ct. 111.

[9] 41 Fed. (2) 651.

[10] The Federal Employers Liability Act, supra, 45 U. S. C. A. 51 et seq.; Cromwell v. Slavey, 262 Fed. (2) 940; Kwasizur, et al. v. Dawnie S. S. Co., et al., 25 Fed. Supp. 327.

[11] Cassil v. U. S. Emergency Fleet Corp., et al., 289 Fed. 774.

Conclusion

Petitioner, therefore, urges this Honorable Court to grant a reargument. The matter is one of the utmost importance to the entire shipping industry and, under present conditions, to the Government. The United States will emerge from the present war with the largest Merchant fleet in history. Most of the vessels are currently owned by the United States and operated by the Administrator, War Shipping Administration. The decision of the Court greatly increases the class of persons to whom the shipowner must become an insurer. The very highest degree of diligence will be no protection. If allowed to stand, the effect of the decision will be that stevedores and longshoremen will no longer pursue the remedies granted by Congress in the Longshoremen's and Harbor Workers' Compensation Act, but will proceed against the owner of the vessel whenever the circumstances of their cases can be claimed, however remotely, to have resulted from the unseaworthiness of the vessel.

Respectfully submitted, Thomas E. Byrne, Jr., Rowland C. Evans, Jr., Krusen, Evans and Shaw, Attorneys for Petitioner.

I hereby certify that the within petition is filed in good faith and not for purposes of delay.

Thomas E. Byrne, Jr.

[fol. 183] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 8722

JOSEPH SIERACKI, Plaintiff, Appellant,

vs.

SEAS SHIPPING CO., INC., Defendant, Appellee, and BETHLEHEM SPARROWS POINT SHIPYARD, INC., BETHLEHEM STEEL COMPANY, Third-Party Defendants

Appeal from Judgment of the District Court of the United States for the Eastern District of Pennsylvania

Answer to Petition for Re-hearing

Abraham E. Freedman, Freedman, Landy and Lorry, 906 Jefferson Building, 1015 Chestnut Street, Philadelphia 7, Pa., Attorneys for Plaintiff Joseph Sieracki.

Received & Filed Apr. 30, 1945. William P. Rowland, Clerk.

[fol. 184] ANSWER TO PETITION FOR REHEARING

Ordinarily, in a petition for a rehearing, one would expect the petitioner to point out an alleged defect in the opinion of the Court or some fallacy in the reasoning. The petitioner here does neither, but rather advances an argument which was neither raised nor discussed either at the oral argument before this Court or in the briefs heretofore filed. Nor does the argument have any bearing on the merits of the decision which this Court has rendered. Under these circumstances, we would ordinarily not burden the Court with any reply, were it not for the fact that the statements set forth in the petition are so utterly opposed to the law.

Petitioner's argument may be reduced to the proposition that the remedy for unseaworthiness is cognizable only in admiralty and since this suit was brought on the law side of the Court, the plaintiff was not entitled to the benefits of the admiralty law. Petitioner contends that this is the

law with respect to members of the crew and concludes that the present decision has the effect of giving the stevedores even greater rights than the members of the crew.

It is amazing that petitioner should advance such a contention in the face of the long standing authorities. It is [fol. 185] particularly significant that not a single case is cited in support of that contention. The absence of any authorities is immediately explained by the fact that there are no authorities to support such a contention but all the reported cases are clearly to the contrary.

The unqualified statement is made on page 2 of the petition that a crew member "could have availed himself of the doctrine (of unseaworthiness) only in an action in admiralty". This statement, although not supported by any citation is even italicized for emphasis. That the statement is diametrically opposed to the settled authorities since time immemorial is immediately evident by even a cursory examination into the authorities. This Court had occasion to pass on that very point in analyzing the effect of the Jones Act, in the case of Brown v. C. D. Mallory, 122 F. (2d) 98, wherein, this Court, through Judge Biggs, said: (p. 101)

> "Before, as after the passage of the Jones Act the seaman could enforce his substantive rights under the maritime law by a libel in admiralty or by any available common law remedy. Garcia y León v. Galceran, 11 Wall, 185, 20 L. Ed. 74."

[fol. 186] Under the judicial code (Sec. 9 of the Judiciary Act of 1789, 28 U. S. C. A. § 41 (3)), a seaman may enforce any right arising under the maritime law in any common law Court or in admiralty. Thornes v. Socony-Vacuum Oil Co., 37 F. Supp. 616, McMenamin v. McCormick Steamship Co., 37 F. Supp. 909. The latter cases involved wages and maintenance and cure and were strictly maritime causes of action, but were litigated on the law side of the Court.

Perhaps the most recent and pertinent decision which clearly settles the issue here is Garrett vs. Moore-McCormack Co., Inc., 317 U. S. 239. In the latter case, the seaman instituted an action in the State Court for a maritime cause of action and the State Court attempted to apply its own rules with respect to the determination of the validity of a release. The Supreme Court of the United States reversed

the Courts below upon the ground that the rights which the seaman enjoyed under the maritime law must be uniformly construed, even though the seaman may bring the right of action in the State Court on the law side of the Federal Court or in the admiralty.

It is, therefore, respectfully submitted that the statement to the effect that the seaman could only bring his maritime cause of action in the admiralty Court is clearly contrary to the settled authorities.

[fol. 187] It has also been suggested that a member of the crew cannot avail himself of a right of action for negligence and claim damages for unseaworthiness at the same time. And petitioner argues from that unsound premise that the decision of the Court in the instant case, therefore, gives the longshoremen greater rights than a member of the crew. We need not go any further than to say that the premise is likewise without any basis in the law. This Court pointed out in the decision of Brown vs. Mallory, supra, that the rights which were given to the seamen under the Jones Act were super-imposed upon those rights which the seamen already enjoyed in the admiralty and were cumulative and not alternative rights. To the same effect is Panama Railroad vs. Johnson, 264 U. S. 375.

It is respectfully submitted that the reasons assigned in support of the petition for a rehearing not only fail to go to the merits of the argument; but they simply do not bear analysis and the petition should, therefore, be denied.

Respectfully Submitted, Freedman, Landy and Lorry,
by Abraham E. Freedman.

[fol. 188] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT—October Term, 1944

No. 8722

JOSEPH SIERACKI, Plaintiff-Appellant,

vs.

SEAS SHIPPING COMPANY, INC., Defendant and Third Party, Plaintiff-Appellee,

vs.

BETHLEHEM STEEL COMPANY and BETHLEHEM SPARROWS POINT SHIPYARD INC., Third-Party Defendants

SUR PETITION FOR REHEARING

And now, to wit June 23, 1945, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia.

Biggs, Circuit Judge.

Endorsements: Order Denying Petition for Rehearing. Received & Filed June 25, 1945. WM. P. Rowland, Clerk.

[fol. 189] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Joint Appendix for Appellants and Appellees, as constituting the portions of the record before this court at argument; and proceedings in this court, in the cases of Joseph Sieracki vs. Seas Shipping Co., Inc., and Bethlehem Sparrows Point Shipyard, Inc., Bethlehem Steel Company, Nos. 8706 and 8722, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 5th day of July in the year of our Lord one thousand nine hundred and forty-five, and of the Independence of the United States the one hundred and seventieth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 192] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this application.

FILE COPY

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FILED
AUG 23 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945. No. 365

SEAS SHIPPING CO., INC.,
Petitioner,

v.

JOSEPH SIERACKI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

JOHN B. SHAW,
ROWLAND C. EVANS, JR.,
THOMAS E. BYRNE, JR.,
Attorneys for Petitioner.

International, 236 Chestnut St., Phila. 6, Pa.

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IN THE

Supreme Court of the United States.

October Term, 1945.

No.

SEAS SHIPPING CO., INC.,
Petitioner,

v.

JOSEPH SIERACKI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Seas Shipping Co., Inc., respectfully prays for a writ of certiorari to review a final order of the United States Circuit Court of Appeals for the Third Circuit which reversed the judgment of the United States District Court for the Eastern District of Pennsylvania in favor of the Petitioner, and entered judgment against the Petitioner and Bethlehem Sparrows Point Shipyard, Inc. and Bethlehem Steel Company, Third Party Defendants, for $9,500.00 for damages on account of personal injury sustained by the Respondent.

STATEMENT OF THE CASE.

Joseph Sieracki, the Respondent herein, was employed as a longshoreman or stevedore by B. H. Sobelman & Co.,

a firm of independent contracting stevedores. Sobelman had a contract to load the Petitioner's vesse' "Robin Sherwood" at Philadelphia.

On December 23, 1942 his employer, Sobelman, assigned Sieracki to operate one of the winches which controlled the 10-ton heavy lift, or jumbo, boom on the ship.

The Petitioner's vessel, "Robin Sherwood", had been built under a contract between the United States Maritime Commission and Bethlehem Steel Company, by the latter company and a sub-contractor, Bethlehem Sparrows Point Shipyard, Inc. When the vessel was completed, and before delivery to the Petitioner, the usual tests required by the Maritime Commission were made and certificates entitled "Certificates of Test of Cargo Handling Gear" were issued over the signatures of representatives of the shipbuilder and the Maritime Commission and delivered with the vessel. The man who was to become Master of the vessel, Captain Bonn, attended as an observer. The vessel was then put in service, but because of the fact that there were two 5-ton booms in addition to the 10-ton heavy lift boom at the same hatch, it had not been necessary to use the heavy lift boom between the date of the tests and the date of the accident here in question. During the intervening months the District Court found, and the Circuit Court of Appeals affirmed the finding, that the gear had been properly cared for.

On December 23, 1942, the stevedores had loaded one piece of cargo weighing approximately 8.2 tons, and were loading a second piece of the same weight when the accident occurred which gave rise to this cause of action. The heavy steel shackle of the topping lift at the peak of the 60-foot boom broke, and the boom fell, injuring the Respondent. He commenced a civil action in the United States District Court for the Eastern District of Pennsylvania against the Petitioner. The Petitioner impleaded Bethlehem Steel Company and Bethlehem Sparrows Point Shipyard, Inc., and filed an Answer denying liability to the

Respondent, but averring that if liability on the part of the Petitioner were shown, it had a right of action over against the two impleaded Defendants. The Respondent herein then filed an Amended Complaint against the impleaded Defendants, and the case proceeded to trial before United States District Judge Kirkpatrick and a jury. At the close of the evidence the amount of the damages was stipulated; the case was withdrawn from the jury, and it was agreed that the Court should determine the questions of liability.

The evidence at the trial clearly supports the finding by the District Judge, affirmed by the Circuit Court of Appeals, that the accident was caused by a defect inside the metal of the shackle. The defect was a flaw in the metal commonly known as a "pipe". This defect was a shrinkage cavity which originated at the time the steel first solidified. The shackle was then forged, galvanized and painted prior to the time the completed ship was delivered to the Petitioner. Its existence was not ascertainable by any external inspection, although the District Judge found as a fact that its presence probably would have been disclosed by X-ray, or by a destructive metallurgical test known as a deep-etch or macro-etch. The District Court found that the Petitioner was not negligent, and this finding was affirmed by the Circuit Court. The District Court held that the Plaintiff-Respondent, a stevedore, was not entitled to a verdict on the mere showing of the defect which constituted unseaworthiness, and was not a "seaman", and could not recover under the general Maritime Law upon a finding of unseaworthiness alone without negligence. The Circuit Court of Appeals reversed this holding of the District Court and held that since the stevedoring work which the Plaintiff was doing at the time of his injury had been done by the members of the ship's crew, he was a "seaman" and entitled to recover on a showing that his injury was caused by unseaworthiness alone, without negligence. The District Court found that the additional Defendants had been negligent and entered judgment against

them, and this was affirmed by the Circuit Court. After the decision of the Circuit Court of Appeals, a Petition for Re-hearing was filed by the Petitioner herein, and denied on June 25th, 1945. This application for a writ of certiorari then followed.

JURISDICTION.

The jurisdiction of this Court to entertain this Petition and to grant the same is provided by Section 347a of Title 28 of the United States Code.

QUESTIONS PRESENTED.

1. Does a shipowner who is not negligent nevertheless warrant to a stevedore employed by an independent contractor that the appliances of his vessel are completely free from defects?

2. Is a stevedore a seaman and entitled to the same warranty of seaworthiness of the vessel as a member of the crew?

3. Is the warranty of seaworthiness founded upon tort or contract?

4. May the Admiralty doctrine allowing recovery of damages by a seaman as a result of the failure to furnish a seaworthy vessel be applied upon the law side of the District Court in favor of a stevedore?

OPINIONS BELOW.

The opinion of the District Court is reported at 57 Federal Supplement 724, and that of the Circuit Court of Appeals at 149 F. (2d) 98 (Advanced Reports for June 25, 1945).

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals is in conflict with decisions on the same question by the Circuit Court of Appeals for the Second, Fifth and Ninth Circuits, and with prior decisions of the Third Circuit, as well as some state court decisions. Some of the decisions have received such inferential approval of this Court as flows from the denial of certiorari.

The Howell, 273 Fed. 513 (C. C. A. 2nd).

DeLuca v. Shepard S. S. Co., Inc., 65 F. (2d) 566 (C. C. A. 2nd); modified by 67 F. (2d) 437.

Jeffries v. DeHart, 102 Fed. 765 (C. C. A. 3rd).

Panama Mail Steamship Co. v. Davis, 79 F. (2d) 430 (C. C. A. 3rd).

Luckenbach S. S. Co., Inc. et al. v. Buzynski, 19 F. (2d) 871 (C. C. A. 5th). Reversed as to the stevedore-employer but not as to ship-owner, 277 U. S. 226, 48 S. Ct. 440.

Jensen v. Bank Line Limited et al., 26 F. (2d) 173 (C. C. A. 9th).

The Mercier, 5 Fed. Supp. 511; affirmed per curiam 72 F. (2d) 1008 (C. C. A. 9th).

Yaconi v. Brady & Gioe, Inc., et al., 246 N. Y. 300, 158 N. E. 876 (Opinion by Cardozo, C. J.). Cert. den. 276 U. S. 636; 48 S. Ct. 421.

The decision of the Circuit Court is clearly contrary to the language and rationale of the Courts in many cases which cannot, however, be said to rule squarely on the point.

Freeman v. A. H. Bull S. S. Co., 125 F. (2d) 774 (C. C. A. 5th).

Skotar v. Lehigh Valley R. Co., 60 F. (2d) 893 (C. C. A. 2nd).

Scheffler v. Moran Towing & Transportation Co., Inc., et al., 68 F. (2d) 11 (C. C. A. 2nd).
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The Drummond, 114 Fed. 976 (D. C., Pa.).
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Steel et al. v. McNeil, 60 Fed. 105 (C. C. A. 5th).
Hamburg-Americanische, etc. v. Gige, 207 Fed. 247 (C. C. A. 5th); cert. den. 231 U. S. 755; 34 S. Ct. 323.
The Henry S. Grove, 22 F. (2d) 444 at 447 (D. Md.).
Cornee v. Baltimore & O. R. Co., 48 F. (2d) 497 (C. C. A. 4th); cert. den. 284 U. S. 621; 52 S. Ct. 9.
The Maharajah, 40 Fed. 784 (Opinion by Judge Addison Brown).

There can be no doubt but that prior to the decision of the Circuit Court of Appeals in the instant case, it had been universally accepted law that the duty owed by a shipowner to a stevedore engaged in loading or unloading cargo on a ship in port but in navigable waters was that of reasonable care. 48 American Jurisprudence, Page 144, §§ 213, 214; 44 A. L. R. 1025; 24 R. C. L. Page 1220, §§ 297, 298 and cases there cited. The decision of the Circuit Court in the case at Bar strikes down the rule of reasonable care and substitutes an absolute warranty irrespective of negligence. The Petitioner has never disputed that it owes a duty of care toward longshoremen and stevedores who come aboard the vessel in port to load and discharge the vessel, but it contends that the so-called "warranty of seaworthiness" extends only to seamen who are actually members of the crew, and arises by reason of the master and servant relationship there existing, and the peculiar status of seamen at sea, which considerations are not present as between the Petitioner and the Respondent.

2. The Circuit Court of Appeals has decided an important question of Maritime Law in a way which is unquestionably at conflict with prior law. 48 American Jurisprudence, Page 144, §§ 213, 214; 44 A. L. R. 1025; 24 R. C. L., Page 1220, §§ 297, 298; Hughes on Admiralty, Second Edition § 104; Robinson on Admiralty, Pages 318, 319; cases cited under point 1, supra.

3. The Circuit Court of Appeals has lifted the definition of the word "seaman" out of its context in *International Stevedoring Co., v. Haverty*, 272 U. S. 50, and applied it to a completely different set of facts. In the *Haverty* case this Court was dealing with a statute and interpreting the meaning of Congress in the use of the word "seaman" in the *Jones Act*, 46 U. S. C. A. 688. It was there held that the word "seaman" included a stevedore. A most unusual situation was there before this Court, which will be discussed hereinafter in the Brief in support of this Petition. Here the meaning of the word must be gleaned from its use in the general Maritime Law, not a specific statute, and the interpretation of the Circuit Court is substantiated neither by reason nor authority.

4. The decision of the Circuit Court has bodily lifted an Admiralty doctrine and applied it in a Civil Action. It thus reached a result which, if allowed to stand, permits a stevedore, without any showing of negligence, to have his case determined and his damages assessed by a jury upon the same basis as if negligence of the most glaring type had been shown. The stevedore is thus given a right which is generally regarded as superior to that given a member of the crew, who must proceed in Admiralty where he rests his right to recover upon unseaworthiness rather than negligence.

5. The decision of the Circuit Court holds a non-negligent shipowner jointly liable with a negligent shipbuilder as if the two were joint tort-feasors, without any determination of primary and secondary liability.

There can be little doubt that the new theory of liability of shipowners promulgated by the Circuit Court of Appeals is one which should be examined by this Court, and a determination made as to whether this new theory is correct or whether the many cases heretofore decided in some of which certiorari has been denied—were incorrectly determined. If the theory is correct, it certainly requires much clarification, and the clarification should come from this Court rather than from the various District and Circuit Courts, because the latter method can only result in greater uncertainty than already exists in Maritime Law. If the doctrine is to stand, only a determination and definition of its scope and limits can make for the uniformity which this Court has always said must be applied to maritime causes of action.

The present case is most appropriate for hearing by this Court, because it is the first case in which this Court has been asked to decide the questions presented. The final decision of these questions is of prime importance to the shipping interests, the stevedores themselves, and the casualty companies which underwrite the liability of stevedoring companies under the *Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. C. A. 901, et seq. Under present conditions, when the merchant ships of the nation are nearly all owned or operated by the United States Government through the Administrator, War Shipping Administration, this case is of interest and importance to the Government and one which, we respectfully submit, merits the decision of this Court.

Respectfully submitted,

SEAS SHIPPING CO., INC.,
Petitioner.

By JOHN B. SHAW,
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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STEVEDORES ARE NOT REGARDED AS SEAMEN IN THE GENERAL MARITIME LAW.

The law on the subject of the responsibility of a shipowner to a stevedore as it existed in some of the Circuits prior to the decision below may be summarized by the following quotations:

"The ship is not an insurer of its appliances nor of the invitees who may operate the gear. It is bound, however, to furnish suitable tackle and machinery, *reasonably safe*, and strong for the work at hand . . . *A secret defect in such gear, even though effecting casualty, will not fasten responsibility upon the vessel or her owners.*" (Italics ours.) *The Mercier, supra* (C. C. A. 9th), 5 Fed. Supp. 511; affirmed per curiam 72 F. (2d) 1008.

"As libelant was an employee of an independent contractor, the relationship of master and servant did not exist between him and the steamship company. However, *it owed him the duty of using reasonable care to furnish him with reasonably safe appliances to work with*, suitable to the work being done, and of inspecting these appliances before turning them over to the contracting company." (Italics ours.) *Luckenbach S. S. Co., Inc., et al. v. Bazynski, supra* (C. C. A. 5th), 19 F. (2d) 871.

"Libelant not being a member of the crew, no question of seaman's rights or contracts arises, under The Osceola, supra. *He must recover on principles of negligence.*" (Italics ours.) *The Howell, supra* (C. C. A. 2nd), 273 Fed. 513.

"The necessary condition of the defendant's liability is that *he owed* to Jeffries *a duty of care*, in violation whereof he negligently committed or omitted some act, and thereby proximately caused the fatal catastrophe." (Italics ours.) *Jeffries v. DeHart*, *supra* (C. C. A. 3rd), 102 Fed. 765.

The decision of the Circuit Court of Appeals affirmed so much of the decision of the Learned Judge of the District Court as held that the Petitioner was free from negligence, and had used all care reasonably required of it. The question of negligence, therefore, is no longer in the case although that was clearly the theory upon which the case was tried. The Circuit Court of Appeals held that, regardless of negligence, the so-called "warranty of seaworthiness" applied. That warranty has been held to apply to a seaman who was a member of the crew of the vessel, *Mahnich v. Southern S. S. Co.*, 321 U. S. 96; 64 S. Ct. 455; *The H. A. Scandrett*, 87 F. (2d) 708 (C. C. A. 2nd), and to entitle him to maintain an action in Admiralty to recover damages for an injury caused by the failure of the shipowner to furnish a seaworthy vessel. In such a case it is not necessary that negligence be proven. The obstacle which the Circuit Court had to overcome was the line of decisions heretofore cited which held that negligence was the only basis upon which a stevedore could predicate recovery against a shipowner. Therefore, said the Circuit Court, a stevedore is a seaman insofar as is necessary to enable him to recover in this particular case. The holding is based upon the result reached by the Court in *International Stevedoring Co. v. Haverty*, 272 U. S. 50; 47 S. Ct. 19.

In writing the opinion of the Court in that case, Mr. Justice Holmes said:

"It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen'. But words are flexible . . . We cannot believe that Congress willingly would have allowed the protection to

men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship."

That decision was handed down on October 18, 1926. Less than six months thereafter, on March 4, 1927, Congress did the very thing which Mr. Justice Holmes, for the Court, had stated he could not believe Congress would allow. It made mandatory the variation of the protection afforded depending upon the fortuitous circumstances of the man's employment by a stevedore or by the ship. This it accomplished by enacting the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901 et seq. See Robinson on Admiralty, pp. 318, 319; Stanley Morrison, "*Workmen's Compensation and Maritime Law*", 38 Yale Law Journal 472.

The Court in the *Haverty* case recognized that, under the general Maritime Law, a stevedore was not a seaman and all that the decision stands for, is that under a particular statute, the Court believed that Congress intended to include stevedores when it used the term "seamen".

In the *Haverty* case, this Court was dealing with an unusual situation. Stevedores and longshoremen had first received compensation in accordance with the Workmen's Compensation statute of the particular state in which they worked. In *Southern Pacific Co. v. Jensen*, 244 U. S. 205; 37 S. Ct. 524, this Court struck down an award of compensation under the New York Statute, and held that it was beyond the power of the state to so regulate a maritime occupation. Congress then passed an amendment to § 24 of the Judicial Code, enacted October 6, 1917, C. 97, 40 Stat. 395. In *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; 40 S. Ct. 438, this Court held that such an enactment was beyond the power of Congress. The Act was again amended by the Act of June 10, 1922, C. 216, 42 Stat. 634. In the *State of Washington v. W. C. Dawson & Co.*, 264 U. S. 219; 44 S. Ct. 302, the Amendment was held unconstitutional. It will thus be seen that when the case of *International Stevedoring*

doring Co. v. Haverty came before this Court, stevedores and longshoremen were completely without redress for injuries received in the course of their employment except under such circumstances as the Maritime Law provided for an action based upon negligence. In 1920, Congress had passed the Merchant Marine Act, which included within it the Jones Act, *supra*, which gave to seamen the same rights which Congress had previously granted to employees of railroads engaged in interstate commerce. A study of the record in the *Haverty* case shows that the idea that perhaps stevedores could be construed to be seamen within the Congressional intent of the Jones Act, originated in the opinion of the Chief Justice of the Supreme Court of the State of Washington. He merely raised the point as an interesting one, but held himself bound by prior decisions to the contrary. It must be remembered that these prior decisions had been under the general Maritime Law, and uniformly held that there was a distinction between a seaman who signed Shipping Articles and sailed on a voyage, and a longshoreman whose only connection with the vessel was to load or unload it while in port. The Briefs of counsel before this Court in the *Haverty* case show that the possibility that Haverty might be construed to be a seaman under the Jones Act was not seriously considered, and is only referred to briefly and without forceful argument in the Brief of the respondent, Haverty. The Petition for Re-hearing in the *Haverty* case indicates the question first arose seriously during the oral argument before this Court. The *Haverty* case was decided on October 18, 1926.

We shall now refer to the question of whether or not the *Haverty* decision construing a stevedore to be a seaman within the meaning of the Jones Act properly reflected the intention of Congress. The Merchant Marine Act of 1920, of which the Jones Act is a section, expressly referred to both stevedores and seamen: In § 30 of the Act, stevedores are twice mentioned in express terms with reference to liens. We do not believe that such a loose use of words can

be attributed to Congress in enacting legislation, and if stevedores had been intended to be included within the Jones Act, Congress would undoubtedly have mentioned them specifically. Our views in this regard are supported by later reports of the Judiciary Committees of the House of Representatives and the Senate. The House Report, No. 639, Second Session, 67th Congress, dated January 31, 1922, clearly indicates that the Judiciary Committee believed that longshoremen and stevedores were a class apart from the seamen who had been given the benefit of the Jones Act. The Report states, "Economically, port workmen and seamen are distinct". The Report of the Judiciary Committee of the Senate on the same bill is even more enlightening. It is Report No. 94, 67th Congress, First Session, and is dated June 6, 1921. The Report was presented by the late Senator Borah. The Report, in part, reads as follows:

> "*There is a clear distinction between the two classes, seamen and landsmen who work in or about ships,* who were confused in the Johnson Amendment and in the situation which arose in the Jensen case. The distinctions are based upon the facts of their employment, upon the separate systems of law which have hitherto been applied to them, and the character of employers which, in the case of seamen, are ships and shipowners, and in the case of landsmen, in the main, independent local contractors." (Italics ours.)
>
> * * * * * *
>
> "The rights of a seaman when injured in the course of his employment are governed not by the common-law of torts but by a special set of rules which are based upon the difference in the conditions of his employment and those of ordinary land workers. A seaman is entitled to maintenance, care, and cure at the expense of the ship and to his wages to the end of the voyage without regard to the question of negligence. When he reaches port the U. S. Marine Hospital is open to him without expense on his part until

he is cured of his illness or injury. This form of compensation for accidents or illnesses incurred by a seaman is of great antiquity; it marks him off very clearly from the landsman who works on ships in port. The rules which govern his right to recover damages for an injury happening at sea because of negligence or fault are different from those which govern the right of recovery of any other class of workmen. (Schuede v. Zenith S. S. Co., 216 Fed. 566, 570). *"The special treatment which seamen have always had under the Acts of Congress was recently emphasized by the provision in the Merchant Marine Act of 1920 extending to seamen but not to other maritime workers the same rights of recovery in case of work accidents now enjoyed by interstate railway employees.*

The employer in the case of a seaman is always the owner or charterer of a ship and he has the use of the peculiar remedies of the admiralty against the ship to recover his wages, or his damages under the maritime law in case of injury.

Longshoremen and ship-repair men are land workers subject neither to the peculiar conditions nor to the laws which regulate seamen. They form a part of the labor force of each State exactly as other workmen in the port in which they are employed. They are not migratory but local; their wages, their conditions of living are governed by local standards. They do not in all cases form a special class always employed in this work. The peculiar maritime law, applying to seamen, is inapplicable to their condition and no attempt has been made to apply it to them. They do not share in the advantages of the United States Marine Hospital, nor are their employers under any obligation to care for them in case of accident." (Italics ours.)

These two reports were made in connection with legislation intended to bring stevedores and longshoremen

within the protection of the workmen's compensation statutes of the various states. They were made after the passage of the Jones Act, and before the decision of this Court in the *Haverty* case.

The *Haverty* decision concerned only the Court's interpretation of the Jones Act, and must be strictly limited, therefore, to actions brought under that Act *by a stevedore against his employer.* The Jones Act governs only liabilities between employee and employer. For all practical purposes, therefore, the effect of the *Haverty* decision was nullified by the passage of the Longshoremen's and Harbor Workers' Compensation Act, which substituted the exclusive remedy of statutory compensation for all other liability whatsoever, as between a stevedore employer and his employee injured on navigable waters. *Cf. Swanson v. Marra Bros., Inc.*, 57 Fed. Supp. 456; affirmed per curiam 149 F. (2d) 646.

In the instant case, the Jones Act is not involved, since the action is not brought by a stevedore against his employer. This is a suit by a stevedore against "third parties", to wit, a shipowner and the builders of the ship, none of whom was his employer. Sequitur that the *Haverty* decision is not controlling. The decision in the *Haverty* case simply held that, in passing the Jones Act, Congress *intended* that the term seamen as used in that Act should include stevedores. No interpretation of the intent of Congress is involved in the instant case. The Circuit Court, however, has borrowed not the reasoning, but *the result* of the reasoning in the *Haverty* case, and has applied it to upset a long established principle of general Maritime Law. It has held that the warranty of seaworthiness, hitherto available only to a seaman against his ship or employer in an Admiralty action, is now available to a stevedore in a Civil Action against third parties, none of whom was his employer.

There are many clear and well-defined distinctions between a seaman in the ordinary sense of the word, and a

stevedore. The Report of the Senate Committee referred to above sets forth some of them. A seaman is essentially a migratory worker, whereas the stevedore is not. A seaman is entitled to the benefits of the United States Marine Hospitals, and a stevedore is not. Stevedores are not certificated by the Department of Commerce as seaman must be. Stevedores receive time and one-half for work in excess of 40 hours per week whereas "seamen" are exempt from this provision of the Fair Labor Standards Act, 29 U. S. C. A. 213, and the regulations thereunder. They are members of different unions for the purposes of collective bargaining.

In *Mahnich v. Southern S. S. Co., supra*, Mr. Chief Justice Stone stated,

> "But the admiralty rule that the vessel and owner are liable to indemnify a seaman for injury caused by unseaworthiness of the vessel or its appurtenant appliances and equipment, has been the settled law since this Court's ruling to that effect in The Osceola, 189 U. S. 158; 23 S. Ct. 483. (Citing cases.) The latter rule seems to have been derived from the seaman's privilege to abandon a ship improperly fitted out, and was generally applied, before its statement in The Osceola, supra, by numerous decisions of the lower federal courts during the last century. See The Arizona v. Anelich, 298 U. S. 110, 56 S. Ct. 707.
>
> This was a recognized departure from the rule of the English law, which allowed no recovery other than maintenance and cure for injuries caused by unseaworthiness, Couch v. Steel, 3 El. & Bl. 402, until the enactment of the Merchant Shipping Act of 1876, . . . reenacted by the Merchant Shipping Act of 1894 . . . By that statute there is annexed to every contract of service between the owner of a ship or the master and any seaman thereof an obligation that all reasonable means be used to insure the seaworthiness of the ship before and during the voyage."

It will thus be seen that not only is there a distinct difference between a stevedore and a member of the crew who actually goes out to sea with the vessel, but by reference to *The Osceola, supra*, and the language of Chief Justice Stone above quoted, the doctrine of the warranty that a shipowner will furnish to his seamen a seaworthy vessel is one which arises out of the peculiar circumstances of his employment, entirely different from the employment of a stevedore.

The Maritime Law, it will thus be seen, clearly recognized the distinction between a seaman and a stevedore prior to the decision in *International Stevedoring Co. v. Haverty*. That decision has been criticized as unreal, 38 *Yale Law Journal* 472, *supra*; 27 *Columbia Law Review* 211; *Robinson on Admiralty, supra*. As is said by Stanley Morrison,[1] in "Workmen's Compensation and the Maritime Law", *supra*,

> "The Supreme Court has lost sight of realities with regard to longshoremen and harbor workers."

See also 16 *Boston University Law Review* 308.

THE WARRANTY OF SEAWORTHINESS IS FOUNDED UPON A CONTRACT RELATIONSHIP.

The decision of the Circuit Court of Appeals in the instant case loses sight of the fact that the origin of the doctrine of liability to a seaman by reason of furnishing an unseaworthy vessel or appliances was really one incorporated in the contract of employment, and hitherto applied only when the relationship of master and servant existed.

The Circuit Court admits that, if the warranty depends upon contract, it cannot apply to this case. But, says the Court, the term "warranty" is not intended to indicate a reason for the resultant liability, but rather is a term used

[1] A Stanley Morrison was law clerk to Mr. Justice Holmes in 1919-1920. See *Bowen, Yankee From Olympus*, Appendix, p. 455.

to describe a resulting legal liability, in the nature of an insurer's liability which is rooted in the Admiralty law. But it is rooted only where there is a contract of a special nature between the parties, be it a contract for the carriage of goods, a contract of employment or a contract for the chartering of a vessel. Maritime torts and maritime contracts are the classical examples of Admiralty jurisdiction. The decision of this Court in *The Osceola, supra*, is the very foundation of the American doctrine, yet that decision can be reconciled with the decisions which preceded and followed it only on the basis that the warranty had its foundation in contract. Here there is no tort unless there can be read into the general Maritime Law, untouched by statutes such as the Jones Act, an insurer's liability, one where, in the old common-law sense of the word, there has been no tort because there has been no negligence.

That the master and servant, or employer and employee, relationship is a sufficient and distinct ground for changing the relationships which ordinarily exist between persons is so clear as not to require the citation of authority to this Court. The shipowner is not the employer of the Respondent in this case, and he is not the employer of the numerous classes of workmen who may come on board his ship while it is in port, such as welders, radio repairmen and the like. Cf. Dissenting opinion of Mr. Justice Brandeis, in *State of Washington v. W. C. Dawson & Co., supra*. He must have them in order to do the repairs and maintenance necessary by reason of the high duty imposed upon him to furnish a vessel seaworthy in all respects for its intended voyage. The same reasons which make the rule desirable as to a member of the crew who, once having joined, must obey all lawful commands and is subject to penalties if he leaves the employment without authority, do not apply to these port workmen who live ashore, work by the hour or the day, do not put out to sea, are not subject to the orders of the officers, and who may walk ashore without hindrance whenever they choose.

One cannot examine the language of the Court in *The Osecola, supra*, without reaching the conclusion that when the Court held that the vessel and her owner are "liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship", the word "seamen" was used interchangeably in the same case with the term "members of the crew", and was intended to apply to those employed by the owner in that capacity.

The Circuit Court of Appeals reasons that because the work of loading and unloading ships was once, long ago, done by members of the crew, the fact that it is now done by a distinct class of workers is not enough to change the ancient rights. The statement that the work done by stevedores was once performed by members of the crew appears to have first been made in a decision by Judge Benedict, *The Circassian*, 1 Ben. 209. We have little doubt as to its accuracy, but our research into the American law discloses that the work of loading and unloading cargo in the United States has always been done, in whole or in part, by a group of land workers who have been known by different names from time to time. Some early cases referred to them as "roustabouts". Cf. *Liability for Injury to Roustabouts*, 54 Central Law Journal 264. Other cases call them "freighters", "landsmen" and "workmen coming on board"; *The Ole Oleson*, 20 Fed. 384; *The Max Morris*, 24 Fed. 860; 137 U. S. 1; *Hughes on Admiralty, supra*, § 103. Regardless of whether or not the work was once done by members of the crew, times change. The reason for the rule ceases when the conditions which gave rise to it originally have been dissipated by the inexorable march of progress. Medical attention was once furnished by barbers, but that is no reason for calling the barber of today a physician.

There are a number of cases which recognize that the duty to furnish a seaworthy vessel relates to the time of sailing or "breaking ground": *Globe S. S. Co. v. Moss*, 245 Fed. 54; *The Josephine*, 49 F. (2d) 207; *The Fort*

Gaines, 21 F. (2d) 863; *Cullen Fuel Co., Inc. v. W. E. Hedger, Inc.*, 290 U. S. 82; 54 S. Ct. 10; *Warranty of Seaworthiness*, 48 Solicitor's Law Journal 81. Any other interpretation would obviously make it impossible of compliance by the shipowner. Nothing as large as a ship and her machinery could possibly be absolutely perfect at all times; maintenance and repair are obviously necessary and, of necessity, are largely performed in port. Under the doctrine of the decision of the Circuit Court, it has been argued that the Court must direct a verdict (binding instructions on the question of liability) in favor of a stevedore injured while clearing away the wreckage of a boom which had broken while being used by his fellow employees, on the ground that even under such circumstances there was an absolute duty upon the shipowner to furnish a seaworthy vessel which amounted to an insurer's liability.[2]

Thus far, we have not referred to recent decisions of this Court which have recognized the distinction between members of the crew of a vessel and stevedores. The problems before the Court in *South Chicago Coal & Dock Co. et al. v. Bassett*, 309 U. S. 251; 60 S. Ct. 544, and *Norton v. Warner Co.*, 321 U. S. 565; 64 S. Ct. 747, were similar to that in the case at Bar in that each required a distinction to be made between the two based upon the general maritime law, although it is true that the question, once decided, determined whether or not the particular person came within the scope of an Act of Congress. In the *Bassett* case this Court, referring to stevedores, said:

> "They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation."

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[2] *Bruszewski v. Isthmian Steamship Company*, U. S. D. C., E. D. Pa., Civil Action No. 3632.

The distinction there drawn is, we submit, equally valid here. As was said by Mr. Justice Cardozo when he was Chief Justice of the New York Court of Appeals, in *Yaconi v. Brady & Gioe, Inc., et al.*, 246 N. Y. 300; 158 N. E. 876, when the same argument was made as was here accepted by the Circuit Court of Appeals,

> "A stevedore however styled under the Jones Act is not a seaman under the rule of general maritime law with its special exemption to those subject to the power of a master . . . Such a laborer is subject to the general maritime law, but not to the distinctive features of that law which applied to seamen and no others."

That language by Mr. Justice Cardozo, who cited the *Haverty* case in his opinion, was before this Court upon petition for writ of certiorari. The Court which there denied the petition, 276 U. S. 636; 48 S. Ct. 421, was exactly the same Court which one year before had decided the *Haverty* case. The decision in the instant case accepts the theory which Mr. Justice Cardozo rejected, and the holdings are flatly contradictory.

ENFORCING AN ADMIRALTY DOCTRINE ON THE LAW SIDE OF THE COURT.

The doctrine of seaworthiness was originally known only in Admiralty; it was not and is not a common-law doctrine. Prior to the Jones Act, although a member of the crew had certain rights "saved" to him to proceed in the common-law Courts, 28 U. S. C. A. 41, his right to recover an indemnity over and above wages, maintenance and cure was dependent upon a showing of unseaworthiness.

As is said by Frederic Cunningham in 18 *Harvard Law Review* 294,

> "It surely needs no argument to show that if several different systems of law are being administered in the same jurisdiction each must be confined to and be administered by the Courts undertaking to admin-

ister it, or there will be no certainty in the law, . . . *It will not do for a common law court to proceed in accordance with the Admiralty law, nor for an Admiralty Court to proceed in accordance with the common law.* The fact that in the United States the judges who exercise the Admiralty jurisdiction have also common law jurisdiction, makes it somewhat difficult to keep the two systems separate." (Italics ours.)

If the decision of the Circuit Court is correct, a stevedore can obtain a jury trial in the District Court and recover upon the basis of unseaworthiness without a showing of negligence, whereas a member of the crew, to obtain a jury trial in the same Court, must prove negligence.

We respectfully submit that this case is of sufficient importance, and the doctrine announced so at variance with prior holdings as to warrant this Court's granting the Petition and issuing the Writ of Certiorari.

Respectfully submitted,

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1945. No. 365.

SEAS SHIPPING COMPANY, INC.,
Petitioner,

v.

JOSEPH SIERACKI,
Respondent.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

October Term, 1945.

No. 365.

SEAS SHIPPING CO., INC.,

Petitioner,

v.

JOSEPH SIERACKI,

Respondent.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW.

The opinion of the District Court is reported at 57 Federal Supplement 724, and that of the Circuit Court of Appeals at 149 F. (2d) 98.

JURISDICTION.

The jurisdiction of this Court to entertain this Petition is provided by Section 347a of Title 28 of the United States Code.

QUESTIONS PRESENTED.

1. Does a shipowner who is not negligent nevertheless warrant to a stevedore employed by an independent contractor that the appliances of his vessel are completely free from defects?

2. Is a stevedore a seaman in the sense that he is entitled to the same warranty of seaworthiness of the vessel as a member of the crew?

3. Is the warranty of seaworthiness founded upon tort or contract?

4. May the Admiralty doctrine allowing recovery of damages by a seaman as a result of the failure to furnish a seaworthy vessel be applied upon the law side of the District Court in favor of a stevedore?

5. Is the liability, if any, of Petitioner, the shipowner, primary or only secondary?

STATEMENT OF THE CASE.

Joseph Sieracki, the Respondent herein, was employed as a longshoreman or stevedore by B. H. Sobelman & Co., a firm of independent contracting stevedores. Sobelman had a contract to load the Petitioner's vessel "Robin Sherwood" at Philadelphia.

On December 23, 1942 his employer, Sobelman, assigned Sieracki to operate one of the winches which controlled the 10-ton heavy lift, or "jumbo," boom of the ship.

The Petitioner's vessel, "Robin Sherwood", had been built under a contract between the United States Maritime Commission and Bethlehem Steel Company, by the latter company and a sub-contractor, Bethlehem Sparrows Point Shipyard, Inc. When the vessel was completed, and before delivery to the Petitioner, the usual tests required by the Maritime Commission were made and certificates entitled "Certificates of Test of Cargo Handling Gear" (R. 104b-104c) were issued over the signatures of representatives of the shipbuilder and the Maritime Commission and delivered with the vessel. The man who was to become Master of the vessel, Captain Bonn, attended as an observer (R. 58). The vessel was then put in service, but because of the fact that there were two 5-ton booms in addition to the 10-ton heavy lift boom at the same hatch, (R. 59) it had not been necessary to use the heavy lift boom between the date of the tests and the date of the accident here in question. During the intervening months the District Court found, and the Circuit Court of Appeals affirmed the finding, that the gear had been properly cared for.

On December 23, 1942, the stevedores had loaded one piece of cargo weighing approximately 8.2 tons, and were loading a second piece of the same weight when the accident occurred which gave rise to this cause of action. The heavy steel shackle of the topping lift at the peak of the 58-foot "jumbo" boom broke, and the boom fell, injuring the Respondent. He commenced a civil action in the United States District Court for the Eastern District of Pennsylvania against the Petitioner. The Petitioner impleaded Bethelehem Steel Company and Bethlehem Sparrows Point Shipyard, Inc., and filed an Answer denying liability to the Respondent, but averring that if liability on the part of the Petitioner were shown, it had a right of action over against the two impleaded Defendants. The Respondent herein then filed an Amended Complaint against the impleaded Defendants, and the case proceeded to trial before United States District Judge Kirkpatrick and a jury. At the close of the evidence the amount of the damages was stipulated; the case was withdrawn from the jury, and it was agreed that the Court should determine the questions of liability.

The evidence at the trial clearly supports the finding by the District Judge, affirmed by the Circuit Court of Appeals, that the accident was caused by a defect inside the metal of the shackle. The defect was a flaw in the metal commonly known as a "pipe". This defect was a shrinkage cavity which originated at the time the steel first solidified. (R. 65, 66) The shackle was then forged, galvanized and painted prior to the time the completed ship was delivered to the Petitioner (R. 58). Its existence was not ascertainable by any external inspection, although the District Judge found as a fact that its presence probably would have been disclosed by X-ray, or by a destructive metallurgical test known as a deep-etch or macro-etch (R. 103, 104, 127).

The District Court found that the additional Defendants, the Bethlehem Companies, had been negligent and entered judgment against them. This was affirmed by the Circuit Court of Appeals. The District Court found that

the Petitioner was not negligent, and this finding was affirmed by the Circuit Court. The District Court held that the Plaintiff-Respondent, a stevedore, was not entitled to a verdict against Petitioner on the mere showing of the defect which constituted unseaworthiness, and was not a "seaman", and could not recover against Petitioner under the general Maritime Law upon a finding of unseaworthiness alone without negligence. The Circuit Court of Appeals reversed this holding of the District Court and held that since the stevedoring work which the Plaintiff was doing at the time of his injury had, in remote times, been done by the members of the ship's crew, he was a "seaman" and entitled to recover on a showing that his injury was caused by unseaworthiness alone, without negligence. A joint judgment against the Bethlehem Companies on the one hand and the Petitioner on the other was thus entered.

ARGUMENT.

The decision of the Circuit Court of Appeals holds that a longshoreman or stevedore is entitled to recover damages from a shipowner by reason of injuries received on board a ship which were caused, not by the negligence of the shipowner, but by the negligence of a third party, the shipbuilder.

The first two points discussed herein become applicable if, and only if, the main point in the case should be decided against the Petitioner. It is not conceded, however, that there should be any right of recovery by this Respondent against this Petitioner.

The doctrine of seaworthiness is an admiralty doctrine and has no application in an action on the civil side of the court.

There is no question but that the Respondent's cause of action is of a maritime nature, and thus within the Admiralty jurisdiction. *Atlantic Transportation Co. v. Imbrovek*, 234 U. S. 52; 34 S. Ct. 731. The doctrine of seaworthiness is an Admiralty doctrine and was heretofore cognizable only in Admiralty, *Panama R. Co. v. Johnson*, 264 U. S. 375; 44 S. Ct. 391; *The Osceola*, 189 U. S. 158; 23 S. Ct. 483. When Mr. Justice Brown, in *The Osceola, supra*, said, "upon a full review, however, of English and American authorities upon these questions . . .", we think it is clear that he referred to a review of Admiralty and not common law authorities. This Court has, impliedly, recognized the Admiralty application of the doctrine. In *Mahnich v. Southern S. S. Co.*, 321 U. S. 96; 64 S. Ct. 455, this Court said:

> "*But the admiralty rule* that the vessel is liable to indemnify a seaman for injury caused by unseaworthiness of the vessel or its appurtenant appliances and

equipment, has been settled law since this Court's ruling to that effect in The Osceola." (Italics ours.)

If seaworthiness is an Admiralty doctrine, within the language of Section 41 of Title 28 of the United States Code, jurisdiction is in Admiralty and the remedy is not "saved" because it is not a common law remedy.

"It is not a remedy in the common law courts which is saved, but a common law remedy." *The Moses Taylor*, 71 U. S. 411; 18 L. Ed. 397.

Since the present action was instituted upon the *law side* of the District Court, it is the position of the Petitioner that it was improper to rest the decision upon an Admiralty doctrine and that any recovery by the Respondent should have been predicated only upon the common law ground of negligence. The following comment expresses the Petitioner's position on this point:

"It surely needs no argument to show that if several different system of law are being administered in the same jurisdiction each must be confined to and be administered by the Courts undertaking to administer it, or there will be no certainty in the law, . . . It will not do for a common law court to proceed in accordance with the Admiralty law, nor for an Admiralty Court to proceed in accordance with the common law. The fact that in the United States the judges who exercise the Admiralty jurisdiction have also common law jurisdiction, makes it somewhat difficult to keep the two systems separate." Frederic Cunningham in *18 Harvard Law Review 294.*

The rationale of the decision in *Schuede v. Zenith S. S. Co.*, 216 Fed. 566,[1] affirmed 244 U. S. 646, 37 S. Ct. 652, supports our views. In *American Steamboat Co. v. Chace, Adm'r.*, 83 U. S. 369 at 372, the Court said:

"Examined carefully, it is evident that Congress intended by that provision to allow the party to seek re-

[1] Cited in Report of Senate Committee, post, p. 23.

dress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy. Properly construed, a party under that provision may proceed *in rem* in the admiralty, if a maritime lien arises, or he may bring a suit *in personam* in the same jurisdiction, or he may elect not to go into admiralty at all, and *may resort to his common law remedy* in the State Courts, or in the Circuit Courts of the United States if he can make proper parties to give the circuit court jurisdiction of his case." (Italics ours.)

In *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 S. Ct. 524, in the dissenting opinion of Mr. Justice Pitney, the following language seems to us to be applicable to this phase of this case:

". . . . if, . . . , it had been the right of parties suing or sued in state courts upon causes of action of a maritime nature to insist that their cases should be determined according to the rules of decision found in the law maritime, this right or immunity might have been asserted as a Federal right, and its denial made the ground of a review of the resulting judgment, under a writ of error (or, now, a writ of certiorari) from this court to the state court of last resort. Yet, until the present case, and others submitted at the same time, the reported decisions of this court show not a trace of any such question raised. I can conceive of no stronger evidence to prove that from the foundation of the government until the present time it has been the opinion of the bar and of the judiciary, in the state courts as well as in the courts of the United States, that it was not the right of parties suing or sued in state courts of law or equity upon causes of action arising out of maritime affairs, to have them decided according to the principles that would have controlled the decision had the suits been brought in the admiralty courts."

In the dissent of Mr. Justice Holmes in the same case, at page 531 of 37 S. Ct., it is said:

> "This court has recognized that in some cases different principles of liability would be applied as the suit should happen to be brought in a common law or admiralty court."

The so-called doctrine of seaworthiness is as strictly an Admiralty doctrine as specific performance is an equitable doctrine. Few would argue that an action at common law could be maintained for specific performance.

The decision in *Garrett v. Moore-McCormack Co., Inc.*, 317 U. S. 239; 63 S. Ct. 246 is not opposed to this view. There the Court was applying an Act of Congress (The Jones Act) which modified the Maritime Law. Here there is no statute involved although we do not dispute for a moment the power of Congress to legislate on the subject if it so chooses. The fact is that it has not chosen, and its views on the subject are reflected in Congressional reports hereinafter cited. Congress apparently accepted without question the reasoning of *Schuede v. Zenith S. S. Co., supra*, when that case was cited in the report of the Senate Committee, ante, p. 23.

If the decision of the Circuit Court is correct, a stevedore can obtain a jury trial in the District Court and recover upon the basis of unseaworthiness without a showing of negligence, whereas a member of the crew, to obtain a jury trial in the same Court, must prove negligence under the *Jones Act*, 46 U. S. C. A. 688, or proceed in Admiralty, if his cause of action is based on unseaworthiness. *Mahnich v. Southern, S. S. Co., supra.*

Since there was a judgment against a negligent tort-feasor and a party who was not negligent, the liability, if any, of the petitioner, the non-negligent party, is secondary and the petitioner should not be held jointly liable with the negligent tort-feasor.

Both the District Court and the Circuit Court of Appeals found negligence on the part of the Bethlehem Companies, the Third-Party Defendants, and held them liable on that ground. Your Petitioner was exonerated of any negligence by the Judge of the District Court, and this was affirmed by the Circuit Court of Appeals. The basis upon which the Circuit Court held the Petitioner liable was a breach of an implied warranty of seaworthiness. There are many decisions in the maritime law, as in other fields, recognizing the doctrine of primary and secondary liability. *Crane Co. v. Evans Transp. Co. et al.* 1945 A. M. C. 1079; *The Jungshoved*, 290 Fed. 733; cert. den. 263 U. S. 707; 44 S. Ct. 35; *The Tommy*, 39 F. (2d) 577.

It is submitted that the principle enunciated by these cases is sound. The Admiralty doctrine is that the negligent tort-feasor is primarily liable and the party held liable solely by reason of a breach of the warranty of seaworthiness is only secondarily liable. The judgment as it now stands treats the Petitioner and the Bethlehem Companies as if they were joint tort-feasors and, upon the basis of the present judgment, each would eventually be liable for one-half of the amount of the judgment.

Even should this Court affirm the holding of the Circuit Court of Appeals upon the main point in issue, it is submitted that the liability of the Petitioner is, properly, only secondary to that of the Bethlehem Companies and the judgment of the Circuit Court, if not reversed, should be modified accordingly.

The respondent is not a seaman and should not be entitled to the same right of recovery as a seaman.

The important point for decision by this Court is whether or not the Respondent, a stevedore, is a "seaman," as that term is used in the general Maritime Law, and as such, entitled to a recovery against a shipowner upon the same ground as a member of the crew of the vessel.

As far as counsel for Petitioner has been able to discover, there is no other reported case where a stevedore or longshoreman has been granted a recovery against a shipowner on the ground that the latter was responsible to him for a non-negligent but unseaworthy condition. An examination of the reasons underlying the rule as it is applied to seamen who are members of the crew shows that the reasons are not applicable to a stevedore or longshoreman. The fact that apparently no prior decision has granted such a right is a cogent argument that no such right exists, especially in a field which has been so thoroughly litigated.

In the *City of Alexandria,* 17 Fed. 390 at 395, Judge Addison Brown, although discussing another subject, put this point very precisely.

> "Beyond this I find no authority in the ancient or modern codes, in the recognized textbooks, or the decisions on maritime law, for the allowance of consequential damages . . . Considering the frequency of such accidents, and the lasting injuries arising from them in so many cases, the absence of any authority holding the vessel liable, beyond what has been stated, is evidence of the strongest character that no further liability under the maritime law exists."

At page 396 of the same opinion Judge Brown states:

> "When the owners perform all that can be reasonably done on their part by the proper equipment of the vessel for the voyage, and the selection of competent officers and a sufficient crew, no reason exists in natural justice for holding them or their vessel answerable for

the accidents to seamen which happen during the voyage, beyond the limits which the maritime law has established. In this case there is no charge of any remissness on the part of the owners, and the injury arose from causes in no way under their control. There is no ground in reason, therefore, for holding them or the vessel liable; and the maritime law affords no sanction for any claim to compensation beyond that already received . . . "

The reasons underlying the rule of liability for unseaworthiness are referred to by this Court in at least two other decisions. Speaking for the Court in *Mahnich v. Southern S. S. Co., supra*, Mr. Chief Justice Stone said:

> "The latter rule (liability to indemnify a seaman for injury caused by unseaworthiness) seems to have been derived from the seaman's privilege to abandon a ship improperly fitted out, and was generally applied, before its statement in The Osceola, supra, by numerous decisions of the lower federal courts during the last century. See The Arizona v. Anelich, 298 U. S. 110, 56 S. Ct. 707.
>
> This was a recognized departure from the rule of the English Law, which allowed no recovery other than maintenance and cure for injuries caused by unseaworthiness, Couch v. Steel, 3 El. & Bl. 402, until the enactment of the Merchant Shipping Act of 1876, . . . re-enacted by the Merchant Shipping Act of 1894 . . . By that statute there is annexed to every contract of service between the owner of a ship or the master and any seaman thereof, an obligation that all reasonable means be used to insure the seaworthiness of the ship before and during the voyage."

In *The Arizona v. Anelich, supra* (opinion by Mr. Justice Stone), the following language appears in a footnote on page 121 of 298 U. S.; 56 S. Ct. 707 at 710:

"The seaman's right of indemnity for injuries caused by defective appliances or unseaworthiness seems to have been a development from his privilege to abandon a vessel improperly fitted out. The privilege was recognized in Dixon v. The Cyrus, Fed. Cas. No. 3,930, 2 Pet. Adm. 407 (D. C. Pa. 1789), where it was held that the law will imply an engagement to the mariners that 'the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy.' This case was relied on in several early cases recognizing the seaman's right to consequential damages for injuries resulting from faulty equipment. Halverson v. Nisen, Fed. Cas. No. 5,970, 3 Sawy. 562; The Noddleburn (D. C.) 28 F. 855, 856; The Lizzie Frank (D. C. 31 F. 477; and see The Wenonah, Fed. Cas. No. 17,412, 1 Hask. 606. The rule that unseaworthiness releases the seaman from his contract is of uncertain origin, but it is closely related to the master's obligation to owner and shipper that the vessel be well equipped and ballasted. See Marine Ordinances of Louis XIV, Book II, art. VIII, Moloy, De Jure Maritimo et Navali (7th Ed. 1722) p. 223. The seaman's right of indemnity was sustained in The City of Alexandria (D. C.) 17 F. 390; The Edith Godden (D. C.) 23 F. 43; Olson v. Flavel (D. C.) 34 F. 477; The A. Heaton (C. C.) 43 F. 592; The Frank and Willie (D. C.) 45 F. 494; The Julia Fowler (D. C.) 49 F. 277. A seaman was denied recovery for injuries in Couch v. Steele (1853) 3 El. & Bl. 402, on the ground that the owner owed to seamen no duty to make the vessel seaworthy. This case was disapproved in The Noddleburn, supra, 28 F. 855, 857, which allowed recovery for an injury due to defective rigging. The Merchant Shipping Act of 1876, 39-40 Vict. ch. 80, § 5, provided that there should be imported into every contract of service between the owner of the vesssl and the seamen on board an implied obligation 'that the owner

of the ship and the master, and every agent charged with the loading of the ship or the preparing thereof for sea or the sending thereof to sea shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences and to keep her in a seaworthy condition for the voyage during the same.' (See Hedley v. Pinkney & Sons S. S. Co. (1894) A. C. 222, strictly construing this statute.''

See also *Dixon v. The Cyrus, supra; Parsons on Maritime Law* (1859 Edition).

If the reasons given for the rule of warranty of seaworthiness are correct, and we urge that they are, they are not applicable to longshoremen and stevedores. By the very nature of his employment, the stevedore is a stranger to the shipowner. He works on the ship only while it is in port loading or unloading cargo. He is not bound to the ship by a contract embraced in the Shipping Articles. He has the privilege of abandoning the ship at any time, and not merely if it be improperly fitted out. If he were to leave the ship, no penalty would attach to his action as there would in the case of a seaman in the true sense of the word, who would be guilty of desertion. Desertion is still an offense on American vessels, and entails forfeiture of wages, 46 U. S. C. A. 701 (3rd sub-section). In former times, the seaman who left his vessel without authority was subject to apprehension by shore authorities, and could be lodged in jail until the vessel was ready to sail, when he would be returned to the ship. *Revised Statutes of the United States*, § 4598 (Repealed in 1898). See *Robertson et al. v. Baldwin*, 165 U. S. 275; 17 S. Ct. 326. Not one of the reasons for the rule is applicable to the case of a stevedore who is employed by a local contractor and who today works at unloading a ship and tomorrow may work ashore loading the same cargo into railroad cars. Cf. *Report of the Judiciary Committee of the Senate, No. 94, 67th Congress, First Session; June 6, 1921*, where the following statement appears with reference to stevedores:

"They do not in all cases form a special class always employed in this work."

If, as stated in *The Arizona v. Anelich, supra*, the right to indemnity for injuries due to unseaworthiness stems from the right to abandon a vessel improperly fitted out because "the law will imply an engagement to the *mariners* (italics ours) that the ship shall be furnished with all the necessary and customary requisites for navigation", how can the rule be said to apply to a longshoreman or stevedore?

The warranty of seaworthiness is founded upon a contractual relationship.

The decision of the Circuit Court of Appeals in the instant case loses sight of the fact that the origin of the doctrine of liability to a seaman by reason of furnishing an unseaworthy vessel or appliances was really one incorporated in the contract of employment, and hitherto applied only when the relationship of master and servant existed.

The Circuit Court concedes that, if the warranty depends upon contract, it cannot apply to this case. But, the Court states, the term "warranty" is not intended to indicate a reason for the resulting liability but rather is a term used to describe such liability, in the nature of an insurer's liability which is rooted in the Admiralty law. But it is so rooted only where there is a contract of a special nature between the parties, be it a contract for the carriage of goods, a contract of employment, or a contract for the chartering of a vessel. Maritime torts and maritime contracts are the classical examples of Admiralty jurisdiction. The decision of this Court in *The Osceola, supra*, is the very foundation of the American doctrine, yet that decision can be reconciled with the decisions which preceded and followed it only upon the basis that the warranty had its foundation in contract. Here there is no tort unless there can be read into the general Maritime Law, untouched by statutes such as the Jones Act, an insurer's liability, one where, in

the old common-law sense of the word, there has been no tort because there has been no negligence. In "*Liability in the Admiralty for Injuries to Seamen*" by Fitz-Henry Smith, Jr., in 19 Harvard Law Review 418, the author examines the doctrine and reaches the conclusion that the liability of a shipowner for injuries to seamen can have its broadest application only if liability is predicated upon the existence of a contract relationship between the owner and the seamen and the breach thereof:

> "The ground of liability in the first instance is, in reality, *breach of contract*, although the action may sound in tort, and the principle involved is not unlike that of the common law which refuses to deny recovery to the workman on land, when the employer has failed to perform one of his so-called non-assignable duties."

At page 440 of the same article, the following appears:

> "It might be well for the uniformity of the maritime law if the rights of seamen to general damages for physical injuries were made to depend entirely upon contract. . . ."

That the master and servant, or employer and employee, relationship is a sufficient and distinct ground for changing the relationships which ordinarily exist between persons is so clear as not to require the citation of authority to this Court. The Petitioner is not the employer of the Respondent in this case, and he is not the employer of the numerous classes of workmen who may come on board his ship while it is in port, such as welders, radio repairmen and the like.[2] He requires their services for the repairs and maintenance necessary by reason of the high duty imposed upon him to furnish a vessel seaworthy in all respects for its intended voyage. The same reasons which make the rule desirable as to a member of the crew who must obey all lawful commands and is subject to penalties if he leaves the

[2] Cf. Dissenting opinion of Mr. Justice Brandeis, in *State of Washington v. W. C. Dawson & Co.*, 264 U. S. 219; 44 S. Ct. 302, wherein reference is made to an upholsterer.

employment without authority, do not apply to these port workmen who live ashore, work by the hour or the day, do not put out to sea, are not subject to the orders of the officers, and who may walk ashore without hindrance whenever they choose.

The opinion of the Circuit Court points out that if one of the sailors had been hit by the falling boom, he could have recovered on the basis of the breach of the warranty of seaworthiness. We do not here argue the question, but point out that here again the contractual relationship between employer and employee is the basis of the distinction which should be made.

The American law has never applied the warranty of seaworthiness to a stevedore or longshoreman.

The responsibility of a shipowner to a longshoreman or stevedore injured on board the vessel was always, heretofore, grounded upon negligence. The following quotations summarize the law and its application.

> "The ship is not an insurer of its appliances nor of the invitees who may operate the gear. It is bound, however, to furnish suitable tackle and machinery, reasonably safe, and strong for the work at hand. . . . A secret defect in such gear, even though effecting casualty, will not fasten responsibility upon the vessel or her owners." *The Mercier,* 5 F. Supp. 511; affirmed per curiam 72 F. (2d) 1008.

> "As libelant was an employee of an independent contractor, the relationship of master and servant did not exist between him and the steamship company. However, it owed him the duty of using reasonable care to furnish him with reasonably safe appliances to work with, suitable to the work being done, and of inspecting these appliances before turning them over to the contracting company." *Luckenbach S. S. Co., Inc. et al v. Buzynski,* 19 F. (2d) 871.

"Libelant not being a member of the crew, no question of seaman's rights or contracts arise, under The Osceola, supra. He must recover on principles of negligence." *The Howell,* 273 Fed. 513.

"The necessary condition of the defendant's liability is that he owed to Jeffries a duty of care, in violation whereof he negligently committed or omitted some act, and thereby proximately caused the fatal catastrophe." *Jeffries v. DeHart,* 102 Fed. 765.

". . . . The libelant must go farther and show that the fracture was the result of a defect, and that the claimant knew of that defect or by the exercise of reasonable care could have discovered it." *Jensen v. Bank Line,* 26 F. (2d) 173.

Other cases applying the same rule are *DeLuca v. Shepard S. S. Co., Inc.* 65 F. (2d) 566; modified 67 F. (2d) 437; *Panama Mail Steamship Co. v. Davis,* 79 F. (2d) 430. The principle is recognized in the language and rationale of the Courts in the following decisions:

Freeman v. A. H. Bull S. S. Co., 125 F. (2d) 774 (C. C. A. 5th).

Skolar v. Lehigh Valley R. Co., 60 F. (2d) 893 (C. C. A. 2nd).

Scheffler v. Moran Towing & Transportation Co., Inc. et al, 68 F. (2d) 11 (C. C. A. 2nd).

The Bolton Castle, 250 Fed. 403 (C. C. A. 1st).

The Drummond, 114 Fed. 976 (D. C., Pa.).

Johnston v. Turnbull, 130 Fed. 769 (C. C. A. 3rd).

Steel et al v. McNeil, 60 Fed. 105 (C. C. A. 5th).

Hamburger-Americanische, etc. v. Gye, 207 Fed. 247 (C. C. A. 5th); cert. den. 231 U S. 755; 34 S. Ct. 323.

The Henry S. Grove, 22 F. (2d) 444 at 447 (D. C., Md.).

Cornec v. Baltimore & O. R. Co., 48 F. (2d) 497 (C. C. A. 4th); cert. den. 284 U. S. 621; 52 S. Ct. 9.

The Maharajah, 40 Fed. 784 (Opinion by Judge Addison Brown).

The authorities are clear that the duty owed was one of reasonable care. *48 American Jurisprudence*, page 144, §§213, 214; *44 A. L. R.* 1025; *24 R. C. L.*, page 1220, §§297, 298; *Hughes on Admiralty, Second Edition*, §104; *Robinson on Admiralty*, pages 318, 319. The decision of the Circuit Court in the case at Bar strikes down the rule of reasonable care and substitutes an absolute warranty irrespective of negligence. The Petitioner has never disputed that it owes a duty of care toward longshoremen and stevedores who come aboard its vessel in port to load and discharge the vessel, but it contends that the so-called "warranty of seaworthiness" extends only to seamen who are actually members of the crew, and arises by reason of the master and servant relationship there existing, and the peculiar status of seamen at sea, which considerations are not present as between the Petitioner and the Respondent.

The Circuit Court of Appeals reasons that the service of stevedores and longshoremen is necessary to carry out the business of the ship and that this work was once, long ago, performed by the members of the ship's crew. It is not disputed that the injury is one which comes within the classification of a marine tort, *Atlantic Transportation Co. v. Imbrovek, supra*, but Petitioner disputes the reasoning that, although the work is now done by a distinct class of workmen, these workmen should be governed by the ancient rights of those who formerly performed the same labor. The statement that the work done by stevedores was once performed by members of the crew appears to have first been made in a decision by Judge Benedict, *The Circassian*, 1 Ben. 209. Counsel for Petitioner has little doubt as to its accuracy, but our research into the American law

discloses that the work of loading and unloading cargo in the United States has traditionally been done, in whole or in part, by a group of land workers who have been known by different names from time to time. Some early cases referred to them as "roustabouts". *Cf. Liability for Injury to Roustabouts*, 54 Central Law Journal 264. Other cases call them "freighters"; "landsmen", and "workmen coming on board"; *The Ole Oleson*, 20 Fed. 384; *The Max Morris*, 24 Fed. 860; 137 U. S. 1; *Hughes on Admiralty, supra*, § 103. Regardless of whether or not the work was once done by members of the crew, times change. The reason for the rule ceases when the conditions which gave rise to it originally have been dissipated by time and changing conditions. It is a questionable rule which depends upon the job classification of centuries ago for a present finding of liability.

Stevedores Are Not Seamen under the General Maritime Law.

The real foundation of the opinion of the Circuit Court of Appeals rests upon the holding of this Court in *International Stevedoring Co. v. Haverty*, 272 U. S. 50; 47 S. Ct. 19. In that case this Court was interpreting an Act of Congress, §33 of the Merchant Marine Act of 1920, commonly referred to as the *Jones Act*, supra.

In writing the opinion of the Court in that case, Mr. Justice Holmes said:

> "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen'. But words are flexible. . . . We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship."

That decision was handed down on October 18, 1926. Less than six months thereafter, on March 4, 1927, Congress

did the very thing which Mr. Justice Holmes, for the Court, had stated he could not believe Congress would allow. It made mandatory the variation of the protection afforded, depending upon the fortuitous circumstances of the man's employment by a stevedore or by the ship. This it accomplished by enacting the *Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. C. A. 901 et seq. See *Robinson on Admiralty*, supra; Stanley Morrison, *"Workmen's Compensation and Maritime Law"*, 38 Yale Law Journal 472.

The Court in the *Haverty* case recognized that, under the general Maritime Law, a stevedore was not a seaman and all that the decision stands for is that under a particular statute, the Court believed that Congress intended to include stevedores when it used the term "seamen".

In the *Haverty* case, this Court was dealing with an unusual situation. Stevedores and longshoremen had first received compensation in accordance with the Workmen's Compensation statute of the particular state in which they worked. In *Southern Pacific Co. v. Jensen*, 244 U. S. 205; 37 S. Ct. 524, this Court struck down an award of compensation under the New York Statute, and held that it was beyond the power of the state to so regulate a maritime occupation. Congress then passed an amendment to §24 of the Judicial Code, enacted October 6, 1917, C. 97, 40 Stat. 395. In *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; 40 S. Ct. 438, this Court held that such an enactment was beyond the power of Congress. The Act was again amended by the Act of June 10, 1922, C. 216, 42 Stat. 634. In the *State of Washington v. W. C. Dawson & Co., supra*, the Amendment was held unconstitutional. It will thus be seen that when the case of *International Stevedoring Co. v. Haverty* came before this Court, stevedores and longshoremen were completely without redress for injuries received in the course of their employment except under such circumstances as the Maritime Law provided for an action based upon negligence. In 1920, Congress had passed the Merchant Mari-

Act, which included within it the Jones Act, supra, which gave to seamen the same rights which Congress had previously granted to employees of railroads engaged in interstate commerce. A study of the record in the *Haverty* case shows that the idea that perhaps stevedores could be construed to be seamen within the Congressional intent of the Jones Act, originated in the opinion of the Chief Justice of the Supreme Court of the State of Washington. He merely raised the point as an interesting one, but held himself bound by prior decisions to the contrary. It must be remembered that these prior decisions had been under the general Maritime Law, and uniformly held that there was a distinction between a seaman who signed Shipping Articles and sailed on a voyage, and a longshoreman employed by an independent contractor whose only connection with the vessel was to load or unload it while in port. The Briefs of counsel before this Court in the *Haverty* case show that the possibility of Haverty's being construed to be a seaman under the Jones Act was not seriously considered, and is only referred to briefly and without forceful argument in the Brief of the Respondent. The Petition for Re-hearing in the *Haverty* case indicates that the question first arose seriously during the oral argument before this Court.

The question of whether or not the *Haverty* decision construing a stevedore to be a seaman within the meaning of the Jones Act properly reflected the intention of Congress has been the subject of widespread discussion. The Merchant Marine Act of 1920, of which the Jones Act is a section, expressly referred to both stevedores and seamen. In § 30 of the Act, stevedores are twice mentioned in express terms with reference to liens. It is difficult to believe that such a loose use of words can be attributed to Congress in enacting legislation, and if stevedores had been intended to be included within the Jones Act, Congress would undoubtedly have mentioned them specifically. This view is supported by later reports of the Judiciary Com-

mittees of the House of Representatives and the Senate. The House of Representatives Report, No. 639, Second Session, 67th Congress, dated January 31, 1922, clarly indicates that the Judiciary Committee believed that longshoremen and stevedores were a class apart from the seamen who had been given the benefit of the Jones Act. The Report states, "Economically, port workmen and seamen are distinct". The Report of the Judiciary Committee of the Senate on the same bill is even more enlightening. It is Report No. 94, 67th Congress, First Session, and is dated June 6, 1921. The Report was presented by the late Senator Borah. The Report, in part, reads as follows:

> *"There is a clear distinction between the two classes, seamen and landsmen who work in or about ships,* who were confused in the Johnson Amendment and in the situation which arose in the Jensen case. The distinctions are based upon the facts of their employment, upon the separate systems of law which have hitherto been applied to them, and the character of employers which, in the case of seamen, are ships and shipowners, and in the case of landsmen, in the main, independent local contractors." (Italics ours.)
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> • • •
>
> "The rights of a seaman when injured in the course of his employment are governed not by the common-law of torts but by a special set of rules which are based upon the difference in the conditions of his employment and those of ordinary land workers. A seaman is entitled to maintenance, care, and cure at the expense of the ship and to his wages to the end of the voyage without regard to the question of negligence. When he reaches port the U. S. Marine Hospital is open to him without expense on his part until he is cured of his illness or injury. This form of compensation for accidents or illnesses incurred by a seaman is of great antiquity; it marks him off very clearly

from the landsman who works on ships in port. The rules which govern his right to recover damages for an injury happening at sea because of negligence or fault are different from those which govern the right of recovery of any other class of workmen. (*Schuede v. Zenith S. S. Co.*, 216 Fed. 566, 570.) *The special treatment which seamen have always had under the Acts of Congress was recently emphasized by the provisions in the Merchant Marine Act of 1920 extending to seamen but not to other maritime workers the same rights of recovery in case of work accidents now enjoyed by interstate railway employees.*

The employer in the case of a seaman is always the owner or charterer of a ship and he has the use of the peculiar remedies of the admiralty against the ship to recover his wages, or his damages under the maritime law in case of injury.

Longshoremen and ship-repair men are land workers subject neither to the peculiar conditions nor to the laws which regulate seamen. They form a part of the labor force of each State exactly as other workmen in the port in which they are employed. They are not migratory but local; their wages, their conditions of living are governed by local standards. They do not in all cases form a special class always employed in this work. *The peculiar maritime law, applying to seamen, is inapplicable to their condition and no attempt has been made to apply it to them.* They do not share in the advantages of the United States Marine Hospital, nor are their employers under any obligation to care for them in case of accident." (Italics ours.)

These two reports were made in connection with legislation intended to bring stevedores and longshoremen within the protection of the workmen's compensation statutes of the various states. They were made after the passage of the Jones Act, and before the decision of this Court in the *Haverty* case.

The Jones Act was enacted in 1920. In 1924 this Court had before it the case of the *State of Washington v. W. C. Dawson & Co., supra.* One month prior to the hearing of that case, this Court had before it for consideration the Jones Act, supra, in the case of *Panama R. Co. v. Johnson, supra.* If in fact, the Jones Act had supplied a general employers' liability law for stevedores and longshoremen, it is difficult if not impossible to explain the use by this Court in the opinion in the *Dawson* case of the statement that the power of Congress "would permit enactment of a general employers liability law or general provisions for compensating injured employees." If the decision in the *Haverty* case is correct, there was, at the time of the opinion in the *Dawson* case, already an employers' liability law applicable to stevedores and longshoremen, and the decision in the *Dawson* case would necessarily have turned upon the question of how far Congress could permit state laws to apply in a field which Congress had *already* exclusively occupied by a general employers' liability statute.

The *Haverty* decision concerned only the Court's interpretation of the Jones Act, and must be strictly limited, therefore, to actions brought under that Act *by a stevedore against his employer.* The Jones Act governs only liabilities between employee and employer. For all practical purposes, therefore, the effect of the *Haverty* decision was nullified by the passage of the Longshoremen's and Harbor Workers' Compensation Act, which substituted the exclusive remedy of statutory compensation for all other liability whatsoever, as between a stevedore employer and his employee injured on navigable waters. Cf. *Swanson v. Marra Bros., Inc.,* 57 F. Supp. 456; affirmed per curiam 149 F. (2d) 646, certiorari granted November 5, 1945.

In the instant case, the Jones Act is not involved, since the action is not brought by a stevedore against his employer. This is a suit by a stevedore against "third parties", to wit, a shipowner and the builders of the ship, none of whom was his employer. It follows that the *Hav-*

erty decision is not controlling. The decision in the *Haverty* case simply held that, in passing the Jones Act, Congress *intended* that the term seamen as used in that Act should include stevedores. No interpretation of the intent of Congress is involved in the instant case. The Circuit Court, however, has borrowed not the reasoning, but the *result* of the reasoning in the *Haverty* case, and has applied it to upset a long established principle of general Maritime Law. It has held that the warranty of seaworthiness, hitherto available only to a seaman against his ship or employer in an Admiralty action, is now available to a stevedore in a Civil Action against third parties, none of whom was his employer.

There are many clear and well-defined distinctions between a seaman in the ordinary sense of the word, and a stevedore. The Report of the Senate Committee referred to above sets forth some of them. A seaman is essentially a migratory worker, whereas the stevedore is not. A seaman is entitled to the benefits of the United States Marine Hospitals, and a stevedore is not. Stevedores are not certificated by the Department of Commerce as seamen must be. Stevedores receive time and one-half for work in excess of 40 hours per week whereas *seamen* are exempt from this provision of the *Fair Labor Standards Act*, 29 U. S. C. A. 213, and the regulations thereunder. Stevedores have differentiated themselves from seamen in that they are members of different unions for the purposes of collective bargaining.

Congress has always provided differently for seamen, in the true sense of the word, and longshoremen or harbor workers. The *Shipping Commissioner's Act*, 46 U. S. C. A. 541 et seq. provides a series of regulations applicable to the hiring, treatment, payment, and well being of merchant seamen. Congress has provided Marine Hospitals for the care of seamen, required that they be certificated by the Department of Commerce, and has differentiated between seamen and other workmen with respect to the payment of time and one-half for overtime work.

The Respondent in the case at Bar did not consider himself a seaman. When asked what his occupation was, he replied that he was a longshoreman (R. p. 12). He was perfectly correct in so stating. Bouvier's Law Dictionary, Eighth Edition defines a seaman as "a sailor, a mariner, one whose business is navigation—Article 7, Laws of Oleron; Article 19, Laws of Wisby. The term seaman in its most enlarged sense includes the captain as well as the other persons of the crew; in a more confined significance it extends only to the common sailors". The foregoing definition is as accurate today as it was centuries ago in the days of Oleron and Wisby. Ballantine's Law Dictionary (1930) defines a seaman as "a person whose occupation is to assist in the management of vessels at sea." Webster's New International Dictionary, Second Edition, defines a seaman as "one whose occupation is to assist in the management of ships at sea, a mariner, a sailor."

A longshoreman is defined by Webster, supra, as "a laborer, as a stevedore or loader, who works about the wharves of a seaport". Webster defines "stevedore" (derived from the Spanish "estivador" meaning a packer or a stower) as "One who works at, or one who is responsible for, the unloading or loading of a vessel in port."

The Maritime Law, it will thus be seen, clearly recognized the distinction between a seaman and a stevedore prior to the decision in *International Stevedoring Co. v. Haverty*. That decision has been criticized as unrealistic, 38 *Yale Law Journal, supra* 472; 27 *Columbia Law Review*, 211; *Robinson on Admiralty, supra*. As is said by Stanley Morrison, in *"Workmen's Compensation and the Maritime Law", supra,*

> "The Supreme Court has lost sight of realities with regard to longshoremen and harbor workers."

See also 16 *Boston University Law Review* 308.

The cases cited in the opinion of the Circuit Court of Appeals did not consider the question here involved.

In *W. J. McCahan Sugar Refining & Molasses Co. v. Stoffel*, 41 F. (2d) 651, the action was in Admiralty as modified by the Jones Act, and the Court relied upon *International Stevedoring Co. v. Haverty, supra.* The Court in the *Stoffel* case was thus discussing the effect of a release executed by a person who was to be considered a seaman under the terms of the Jones Act under which he was proceeding. Whatever may be the interpretation of the word seaman as used by Congress in the Jones Act, it can have no application to the case at Bar where the Respondent is not proceeding under the Jones Act. That Act is not applicable because he has not sued his employer.

Cassil v. United States Emergency Fleet Corporation, 289 Fed. 774, also relied upon by the Circuit Court, was a Libel in Admiralty. That the statement of the Court in that case concerning unseaworthiness is purely obiter is clearly shown by the later statement in the same opinion, that there was no allegation that the accident resulted from the use of any defective appliance of the ship. If the *Cassil* case is strong authority for any proposition, it is that stevedores are not seamen under the general Admiralty Law, whatever may be their status under the Jones Act.

There is an analogy between the problem here involved and the distinctions which have been recognized between stevedores and members of the crew in the application of the Longshoremen's and Harbor Workers' Compensation Act.

It has been attempted heretofore to point out that the use of the word seaman in the general Maritime Law has applied to those persons who were members of the crew and not to longshoremen or stevedores. In interpreting the Longshoremen's and Harbor Workers' Compensation Act, supra, this Court has now defined the two classes for the

purposes of that Act. In *South Chicago Coal & Dock Co. et al v. Bassett*, 309 U. S. 251, 60 S. Ct. 544, this Court held that a person on board a vessel was not a member of the crew where his duties were such that he was not naturally and primarily on board to aid in the navigation of the vessel. In *Norton v. Warner Co.*, 321 U. S. 565, 64 S. Ct. 747, the test which was applied in determining that Rusin was a seaman was the nature of his duties.

In the *Bassett* case, this Court said,

> "They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employes on the vessel who are naturally and primarily on board to aid in her navigation."

The distinction there drawn is, we submit, equally valid here. As was said by Mr. Justice Cardozo when he was Chief Justice of the New York Court of Appeals, in *Yaconi v. Brady & Gioe, Inc., et al*, 246 N. Y. 300; 158 N. E. 876, when the same argument was made as was here accepted by the Circuit Court of Appeals,

> "A stevedore however styled under the Jones Act is not a seaman under the rule of general maritime law with its special exemption to those subject to the power of a master. . . . Such a laborer is subject to the general maritime law, but not to the distinctive features of that law which applied to seamen and no others."

That language by Mr. Justice Cardozo, who cited the *Haverty* case in his opinion, was before this Court upon petition for writ of certiorari. The Court which there denied the petition, 276 U. S. 636; 48 S. Ct. 421, was exactly the same Court which one year before had decided the *Haverty* case. The decision in the instant case accepts the theory which Mr. Justice Cardozo rejected.

It is submitted that a longshoreman or stevedore is not subject to the distinctive features of the Maritime Law

which apply to members of the crew for the reasons which have been outlined earlier in this Brief.

The duty which the decision of the Circuit Court would fasten upon a shipowner is one which it would be practically impossible for him to meet. There are a number of cases which recognize that the duty to furnish a seaworthy vessel relates to the time of sailing or "breaking ground". *Globe S. S. Co. v. Moss*, 245 Fed. 54; *The Josephine*, 49 F. (2d) 207; *The Fort Gaines*, 21 F. (2d) 865; *Cullen Fuel Co., Inc., v. W. E. Hedger, Inc.*, 290 U. S. 82; 54 S. Ct. 10; *Warranty of Seaworthiness* 48 Solicitor's Law Journal 81. Any other interpretation would obviously make it impossible of compliance by the shipowner. Nothing as large as a ship and her machinery could possibly be absolutely perfect at all times; maintenance and repair are obviously necessary and, of necessity, are largely performed in port.

Seaworthy means "Fit for a sea voyage; able to stand stormy weather in safety", Webster's New International Dictionary (Second Edition). To apply the doctrine blindly and without regard to its true meaning, to a class of persons to whom historic reasons do not apply, is to fasten liability without reason. The Respondent here is not without a remedy. Congress has granted him one against his employer under the applicable Compensation Act. Furthermore, in this case, the Respondent has in fact a final judgment for the full amount of his claim against responsible shipbuilders, the Bethlehem Companies.

Conclusion.

It is respectfully submitted that the Circuit Court of Appeals has misconstrued the applicable Maritime Law because it failed to take into account the reasons which gave rise to the warranty of seaworthiness, which reasons have no application in the case of a longshoreman or stevedore. When the holding of this Court in the *Haverty* case is examined in the light of all of the surrounding circumstances, it becomes clear that it was never intended that the

definition of "seamen" attributed to Congress in passing the Jones Act should extend to all instances where the word has been used in the general Maritime Law. In the case at Bar the Jones Act is not involved, and there is no question of interpreting the intent of Congress in the use of a word in a statute. The meaning of the word "seamen" is to be gleaned from the general Maritime law, from its use by Judges in deciding cases where there was never any question that by using the word "seamen" an intent to include a stevedore might be inferred. It is respectfully submitted that in interpreting this word as used in the general Maritime Law, this Court should reach the conclusion that a stevedore is not a seaman, and that the decision of the Circuit Court of Appeals should be reversed.

The decision of the Circuit Court will, if affirmed, place longshoremen and stevedores in a more favored position than actual seamen who, as wards of the Admiralty, have always been a specially favored class.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 365

SEAS SHIPPING COMPANY, INC.,
Petitioner,

vs.

JOSEPH SIERACKI,
Respondent

BRIEF ON BEHALF OF RESPONDENT ON WRIT OF CERTIORARI

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The Statement of the Case

The respondent, Joseph Sieracki, a longshoreman, brought this action to recover damages for personal injuries sustained on board petitioner's vessel. The latter thereafter impleaded the Bethlehem Companies, and at the trial of the cause, the parties agreed on the amount of damages and submitted the question of liability to the District Judge, waiving the right to a jury trial. The undisputed facts as found by the Trial Judge are as follows (R. 123):

The Steamship "Robin Sherwood" was built by the Bethlehem Companies pursuant to a contract with the United States Maritime Commission. Shortly before the

completion of the vessel, it was assigned to the petitioner, Seas Shipping Company. After taking delivery, petitioner had operated the "Robin Sherwood" for some eighteen months when the vessel entered the port of Philadelphia on December 23rd, 1942 for the purpose of loading a cargo of freight cars, among other things. The job of loading the cargo was delegated to the B. H. Sobelman Company, a stevedoring concern, the employer of respondent. The vessel was equipped with a ten ton boom which had never been used since the delivery of the vessel. This boom was selected to load the cargo on the occasion in question. The longshoremen lowered one piece of a freight car into the hold of the vessel and were engaged in stowing away the second part, the weight of which was not in excess of 8.2 tons when the shackle, which supported the ten ton boom broke, causing the boom and tackle to fall, thereby injuring respondent.

The Trial Judge found that the accident was due to an internal flaw in the shackle and held the Bethlehem Companies liable upon the ground that the defect could have been disclosed by a reasonable inspection in the shipyard. The Trial Judge held further that the petitioner, the shipowner, was not negligent inasmuch as it could not have discovered the defect by a mere visual inspection. The District Judge also found as a fact that the vessel was unseaworthy because of the defective shackle, but held further, that, there being no warranty of seaworthiness so far as respondent was concerned, petitioner could not be held liable on any ground. The Bethlehem Companies appealed from the judgment against them and respondent then appealed from the judgment against him. The Court of Appeals affirmed the judgment against the Bethlehem Companies and reversed the judgment of the District Court on respondent's appeal, holding that there was a warranty of seaworthiness which imposed liability on petitioner. The Seas

Shipping Company thereupon filed its petition for a writ of certiorari which was granted by this Court, and this argument is upon the issues raised in that petition.

Counter-Statement of the Questions Involved

The basic question involved may be simply stated:

Is a shipowner liable to a stevedore for personal injuries caused by an unseaworthy condition of the vessel?

Petitioner also questions the authority of the Court to apply an admiralty doctrine since the suit was commenced on the civil side of the Court. The second question raised by the petition, therefore, is:

May a substantive right, arising under the general maritime law be invoked in an action on the civil side of the Court?

ARGUMENT

Summary of Argument

First. Where a stevedore is injured while engaged in loading operations aboard ship, his claim for indemnity is governed by the same rules which are applicable to seamen generally.

Second. The warranty of seaworthiness, which is the basis of the claim for indemnity, covers all seamen, which term includes not only the members of the crew, but also the stevedores who perform the same services formerly performed by the members of the crew. These services being of direct benefit and necessity to the vessel and her owner.

Third. The warranty of seaworthiness is a substantive and not a procedural right, and it is, therefore, applicable in any Court where the suit may be brought and whether it be on the civil or admiralty side of the Court.

Longshoremen as Seamen under the Maritime Law

In the early days of merchant shipping, the members of the crew attended to all of the services incidental to the management and operation of the vessel in the transportation of passengers and cargo. With advancing times, that part of the crew's services which had to do with the loading and discharging of cargo was gradually taken over by a class of men who became most efficient in the handling of cargo. In the meantime, an intermediary sprang up in the form of a contractor who arranged to provide the men for the loading and discharging operations of the vessels. Although these contractors employ and pay the stevedores, in actual effect they are merely procurers of laborers who become seamen during the period they are discharging those duties which are a part of the seamen's job.

Because the work in which these stevedores are engaged is maritime in character and has direct bearing to the vessel engaged in navigation, no state law can be applicable to govern the rights of these men for personal injuries. *State of Wash. etc.* v. *Dawson*, 264 U. S. 219, 68 L. Ed. 646. Their status and their rights have been held to be governed from the earliest times by the maritime law, and for many purposes they have been specifically characterized as seamen under the maritime law with all the rights implied in the use of that term. In *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 58 L. Ed. 1208, the Court identified this group of men as follows:

> "The libellant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a serv-

> ice absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class '*as clearly identified with maritime affairs as are the mariners*'." (Italics ours.)

There are a number of rights which are vested in members of the crew, but which, by their very nature, cannot be extended to stevedores. A member of the crew who falls ill or is injured in the service of the ship is entitled to wages to the end of his shipping articles and to maintenance and cure so long as his condition requires it, and this is so irrespective of any fault or culpability on the part of the vessel or its owner. *Calmar Steamship Corp.* v. *Taylor*, 303 U. S. 525, 82 L. Ed. 993. These two rights arise out of the seamen's relationship to the vessel, and they contemplate the hazards arising out of the ship's voyage as well as the services performed in connection with the operation of the vessel. The stevedore's employment does not contemplate participation in the actual voyage itself and he is not required to sign shipping articles as are the members of the crew. He thus has no claim for wages based on contract if his employment should suddenly terminate because of illness or injury. Moreover, if he should suddenly be stricken ill or become injured in the course of his employment, he cannot recover the cost of his maintenance and cure, as would have been the case if he had been a member of the crew. The same considerations which preclude a recovery of maintenance and cure and wages to the end of the voyage in connection with a stevedore's injuries do not apply with respect to the claim for indemnity.

Aside of the rights of maintenance and cure and wages to the end of the voyage, the Courts have held since the earliest times that for most other purposes, stevedores

must be considered as seamen with the same privileges and immunities applicable to members of the crew. This proposition is illustrated in the very early case of *the Canada*, 7 Fed. 119 (1881) where a stevedore who had unloaded a vessel, claimed the benefit of a lien against the vessel for wages in the same manner as was accorded to the members of the crew. In holding that the stevedores were entitled to such a lien, the Court, after reviewing the authorities, quoted with approval an excerpt by the learned Judge Benedict from *the Circassion* (1 Ben. 209), which is peculiarly appropriate at this point as follows:

> "The same view was taken of the matter, on principle, by Judge Benedict, in The Circassian, 1 Ben. 209. He says: '*I confess that I have never been able to see any sound distinction between the nature of the services performed in stowing and breaking out the cargo of a ship and its services performed in its transportation.* The stowage and the landing of the cargo form a necessary part of the contract of affreightment. Without the performance of this duty no freight can be earned. The safety of the ship and cargo depends, in a great measure, upon the care and skill displayed in the performance of this duty, and for its non performance in a proper manner the ship is liable in the admiralty. It is a service which, when performed by the crew, as is frequently the case, is considered a maritime service, and compensated in the admiralty under the name of wages. *And, when not performed by the crew, it devolves upon a class as clearly identified with maritime affairs as are the mariners, and fitted for their duty by a special and peculiar experience.*'" (Italics ours.)

A similar view ws adopted in connection with the stevedores' rights for personal injuries in *Gerrity* v. *Bark Kate Cann*, 2 Fed. 241. In that case, a stevedore was injured because of inadequate bracings. In defining the

status of the stevedore, Judge Benedict made the following pertinent observation:

> "In regard to the presence of the libellant in the between-decks, the evidence shows that he was not there by the mere sufferance or license of the shipowner, but for the purpose of performing a service that could not be performed elsewhere, and *in which the shipowner had an interest.* To be sure, the libellant was not directly employed by the shipowner, and it may be truly said that no relation by contract existed between the shipowner and the libellant. But the libellant was trimming the shipowner's ship. He was doing what was necessary to be done to enable the ship to carry the cargo in safety, and the reason why he was so employed was because the shipowner had, by a contract with the charterer, indirectly provided for the performance of this service.
>
> "*There was a relation between the shipowner and the libellant arising, not out of the mere presence of the libellant on board the ship, but out of the service he was then engaged in performing, the necessity of that service to the shipowner, and the circumstances of the libellant's employment to perform that service.*" (Italics ours.)

It is thus apparent that although there is no direct contract relationship between the shipowner and the stevedore, there is nevertheless a relationship between them which arises out of the service which the stevedore performed for the benefit of the vessel. It was because of this relationship that Judge Benedict, in that case, held the stevedore entitled to a lien, against the vessel itself, in connection with his claim for personal injuries. On this point, Judge Benedict continued:

> "For these reasons I conclude that the damages sued for arose from the neglect of a duty owing by the shipowner to the libellant. This neglect was the neglect of a maritime duty, and attaches to the ship herself. Not

only did the neglect occur upon navigable water, but in the performance of a service necessary to be performed to enable the ship to receive her cargo. The stowing of this dunnage was part of the ordinary duty of the ship's crew, and in this case was done by the crew. The object of stowing the dunnage was to facilitate the taking in of the very cargo upon which the libellant was employed at the time he was hurt. Still further, the dunnage and plank that, by reason of neglect in the manner of stowing, fell upon the libellant, were part of the apparel and furniture of the ship.

"*In legal effect the blows inflicted upon the libellant were blows of the ship, and for blows given by the ship she was always been held liable* * * *." (Italics ours.)

It may be stated, therefore, that the stevedore, under the general maritime law, possesses the same lien against the ship itself as though he were a member of the crew in the protection of his wages and of his rights for personal injuries. Nor does the analogy between the stevedore and the member of the crew stop at that point. Further evidence of the judicial trend to extend all possible maritime benefits to the stevedores is evidenced in the case of *McCahan Sugar Refining Co.* v. *Stoffel*, 41 Fed. (2d) 651 (C. C. A. 3) where the stevedore's contract was judged by the same rules which are applicable to members of the crew. In that case, a longshoreman signed an agreement to be bound by a State Compensation Act, and in the same agreement, he released his employer from all liability under the maritime law. The legality of the document was challenged in the Court of Appeals, and, in declaring the release invalid, it was held that the stevedore was entitled to the same rules of construction which are applicable to any seaman's contract. Said the Court:

"There is no question that seamen, though favored by the law and regarded as wards in admiralty, are

capable of making release for maritime injuries, yet in making such releases their rights are tenderly guarded and their acts, when waiving or yielding their rights, are carefully scrutinized."

. . . . . .

"The law regards a longshoreman or stevedore, injured while engaged in maritime service aboard a ship lying in navigable waters, as a seaman with all his peculiar rights and immunities." (Italics ours.)

The attention of the Court is directed to the fact that in each of the foregoing instances the stevedore's rights arose, and he was classified as a seaman under the general maritime law, independent of any statutes. The first relevant legislation occurred in the form of the Jones Act (Mar. 4, 1915, c. 153, sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, sec. 33, 41 Stat. 1007—46 U. S. C. A. 688), which incorporated into the maritime law the Federal Employers' Liability Act for the benefit of seamen generally. The right of stevedores to share in the benefits of that act as seamen was challenged shortly after its passage in the case of *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 71 L. Ed. 157. The Court there followed the same consistent trend which characterizes the longshoremen whenever possible as "seamen" in the protection of their earnings, their contracts and their rights for personal injuries. The Court makes it crystal clear that the fact of employment by a stevedoring contractor rather than by the vessel does not deprive the longshoremen of the protection which the maritime law affords to seamen generally. A brief excerpt from the opinion proves the point most forcefully as follows:

"It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen'. But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered

by the ship's crew. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 62, 58 L. Ed. 1208, 1212, 51 L. R. A. (N. S.) 1157, 34 Sup. Ct. Rep. 733. *We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case, they should be in the other.* In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less than a century, *we are of opinion that a wider scope should be given to the words of the act, and that in this statute 'seamen' is to be taken to include stevedores employed in maritime work on navigable water, as the plaintiff was, whatever it might mean in laws of a different kind.*" (Italics ours.)

It has been suggested in petitioner's brief that the classification of stevedores as seamen under the Jones Act must be limited strictly to the Jones Act itself without reference to the general maritime law. That such a construction is wholly erroneous is clearly evidenced from the authorities heretofore set forth. Moreover, that contention overlooks the fact that the Jones Act was never intended to create a right standing by itself, but rather a right in its setting in the maritime law. In other words, it is the maritime law as modified by the Jones Act which prescribes the right. *Panama Railroad* v. *Johnson*, 264 U. S. 375. Petitioner's contention is clearly refuted in the case of *Jamison* v. *Encarnacion*, 281 U. S. 635, 74 L. Ed. 1082, where the Court said:

"Plaintiff was a seaman within the meaning of § 33 (International Stevedoring Co. v. Haverty, supra), and, as he sustained the injuries complained of while loading a vessel in navigable waters, *the case is gov-*

erned by the maritime law as modified by the acts of Congress above referred to." (Italics ours.)

A somewhat unique situation arose in the case of *Uravic v. Jarka Co.*, 282 U. S. 234, 75 L. Ed. 312, where a longshoreman was killed on a German ship, and it was contended that he could not be construed as a seaman inasmuch as the crew were foreign and the vessel flew a foreign flag. In rejecting this contention, the Court permitted the Administratrix the same remedies arising out of any American seaman's death, as follows:

> "Perhaps it would be a sufficient answer to the objections that while the § 33 is construed to give the rights of seamen to stevedores it does not say or mean that stevedores are to be regarded as seamen on the particular vessel upon which for the moment they happen to be at work. *They simply are given the rights of seamen and as they are American workmen they have the rights of American seamen as well on German as on American ships.*" (Italics ours.)

In summary, while the longshoremen may be distinguished from the members of the crew, there can be no doubt but that they have the rights of seamen, at least in connection with claims for indemnity for personal injury, and in the protection of their earnings and their contracts. The petitioner's contention that the stevedore's rights as a seaman must be limited only to his employer, under the Jones Act, is completely at variance with the settled authorities which characterize stevedores as seamen under the general maritime law, and particularly, with those which show that the stevedore's rights extend even against the ship itself in rem.

The Warranty of Seaworthiness Extends to Longshoremen

In general, the duty of a shipowner to provide a seaworthy vessel is an absolute one and is defined in *The Niagara*, 62 U. S. 7, 16 L. Ed. 41, as follows:

> "A carrier's first duty, and one that is implied by law, when he is engaged in transporting goods by water, is to provide a seaworthy vessel, tight and staunch, and well furnished with suitable tackle, sails, or motive power, as the case may be, and furniture necessary for the voyage."

In *The Turret Crown*, 297 Fed. 766, cert. den., 264 U. S. 591, the Court held:

> "Ordinarily a shipowner warrants that his ship is seaworthy in all respects, and not merely that he has used due diligence to make her seaworthy. Of course, the parties may stipulate to the contrary. The warranty is absolute that the ship is, or in fact shall be seaworthy at the time of engagement, and does not depend on the owner's knowledge or ignorance or his care or negligence. The Edwin I. Morrison, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688."

The warranty of seaworthiness applies not only for the protection of the cargo, but extends also to the benefit of the seamen whose services are necessary in connection with the transportation and operation of the vessel. In *the "H. M. Scandrett"*, 87 F. 2d 708, the suit was by a member of the crew who claimed damages because of an unseaworthy device. In holding the vessel liable, the Court said:

> "This is not an action under the Jones Act (41 Stat. 988) founded on negligence. The libellant is invoking a remedy based on unseaworthiness or defective condition of the vessel or her equipment. In such a case the liability for any injuries arising out of the neglect

to supply a seaworthy vessel is not dependent on the exercise of reasonable care but is absolute."

In this connection, it is significant to note that there has been considerable confusion in defining the basis of a shipowner's liability for an unseaworthy condition, even with respect to a member of the crew. In *the "Osceola"*, 189 U. S. 158, 47 L. Ed. 760, the Court, in reviewing the early authorities, pointed out that while a large number of the decisions predicated the liability on negligence, the Courts were really talking about unseaworthiness. The uncertainty of the rule as it applied to members of the crew was considered in *the "Seandrett"*, *supra*, as follows:

> "It is true that in some suits brought to recover damages for injuries arising out of an unseaworthy vessel the cause of action has been treated as based on negligence. Such was the case of Burton v. Greig, 271 F. 271, 272, decided by the Circuit Court of Appeals, of the Fifth Circuit." But in Sabine Towing Co. v. Brennan (C. C. A.) 72 F. (2d) 490, 494, certiorari denied 293 U. S. 611, 55 S. Ct. 141, 79 L. Ed. 701, Judge Hutcheson, writing for the majority, said that there is a duty of shipowners to their seamen to see that the ship is seaworthy and her equipment in safe condition for use when she starts on her voyage and that such duty *'as to injuries, for which the general maritime law provides recovery, is absolute.'"* (Italics ours.)

In concluding, the Court, in *the "Seandrett"*, laid down the rule of the maritime law governing injuries to seamen as follows:

> "In our opinion the libellant had a right of indemnity for injuries arising from an unseaworthy ship even though there was no means of anticipating trouble.
>
> "The ship is not freed from liability by mere due diligence to render her seaworthy as may be the case under the Harter Act (46 U. S. C. A. §§ 190-195) where loss results from faults in navigation, *but under the*

> *maritime law there is an absolute obligation to provide a seaworthy vessel and, in default thereof, liability follows for any injuries caused by breach of the obligation.*" (Italics ours.)

The most recent decision of this Court on the point was rendered in the case of *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 88 L. Ed. 561, where the suit was by a member of the crew and based on unseaworthiness. It was contended there that the negligence of the mate was an intervening act which insulated the owner from liability for the unseaworthy condition. The Court unequivocally denied that contention, and in connection with the general scope of the warranty of seaworthiness, said:

> "It required the Harter Act to relax the exacting obligation to cargo of the owner's warranty of seaworthiness of ship and tackle. *That relaxation has not been extended, either by statute or by decision, to the like obligation of the owner to the seaman.*" (Italics ours.)

An interesting situation arose in "*The Student*", 243 Fed. 807, cert. den. 245 U. S. 658, 62 L. Ed. 534, where a stevedore was killed by a defective shackle. The vessel was held liable notwithstanding the fact that the defect could not be seen. It will be seen from the language of the Court that the shipowner owed a duty to provide proper equipment in the sense that it must be seaworthy. An excerpt from the opinion shows:

> "Although this is hardly a case to which the doctrine of res ipsa loquitur applies, yet the fact that the pin did become loose gives support to the contention that it was not such a pin as the ship was bound to furnish * * * Taking everything into account, we are inclined to the conclusion * * * that the pin in question was shown to be defective and unfit * * * *and*

if this conclusion be accepted the liability of the ship follows under familiar principles of law."

" * * If it was in fact unsafe by reason of imperfection or unfitness which could not be seen after it was inserted in the shackle, the responsibility therefore rested upon the ship and not upon the contractor because the ship was bound to furnish tackle free from defects of that character."* (Italics ours.)

The principle of law which we advance here was adopted very early in our law in absolving a shipowner of liability in the case of *Malone v. Western Transportation Co.*, Fed. Case No. 8996. There the longshoreman was engaged by the shipowner to help stow cargo into the vessel and he was injured through the neglect of a member of the crew. No unseaworthy condition was shown. A demurrer to the action was sustained by the Court on the ground that the injury was due to the negligence of a fellow servant. In classifying the longshoreman in the same category as the members of the crew and in holding that the shipowner should only be liable for an unseaworthy condition, the Court said:

"If he provides a seaworthy ship, properly equipped, and commanded by competent officers, he has discharged his duty toward the subordinates. They must be deemed to have entered upon the service with the understanding that they take the chances of the neglect or carelessness of any or all others *who are engaged in the common employment and occupation of loading, unloading or running the boat.* Demurrer sustained." (Italics ours.)

A much more recent case, in which the same theory was followed in absolving the United States as a private operator, is the case of *Cassil v. United States Emergency Fleet Corp.*, 289 Fed. 774 (C. C. A. 9). In that case, the suit was also by a stevedore against the owner of the vessel

for personal injuries, and in stating the liability of the shipowner to the longshoreman, the Court said:

> "The appellant was engaged in rendering a maritime service when he received his injuries. *He could hold the Emergency Fleet Corporation responsible for damages only on the theory that the vessel was unseaworthy in respect to the instrument whereby his injuries were occasioned.*" (Italics ours.)

Thus, it is fair to state that the foregoing cases would hold a shipowner liable to a stevedore if the injuries had been caused by unseaworthiness. The conclusion follows that the warranty of seaworthiness extends to stevedores. A significant statement in this connection is found in *The Helios*, 12 Fed. 732, where the Court, in holding the vessel liable, made this very pertinent statement:

> "When the first mate told the stevedore the vessel was ready for him to proceed to stow the cargo, *that was a virtual warranty* against all such traps in the darker parts of the vessel, which could not be or would not be perceived in the ordinary course of stowage." (Italics ours.)

The consistent trend of judicial decision has been to afford longshoremen all of the benefits of seamen wherever possible to do so. Their wages have been protected by a lien against the ship, and for their personal injuries they have always been accorded a lien against the vessel itself, in the same manner as though they were members of the crew. Their contracts are governed by the same protective rules which are available to seamen generally. When the Supreme Court in the *Haverty* case held that longshoremen must be construed to be seamen under the Jones Act, the Court was not invoking a new or novel theory of law, but was merely following the trend which had been set in motion by the Courts themselves since the earliest times. By in-

cluding stevedores as seamen within the meaning of the Jones Act, the Congress was merely supplementing the stevedore's rights under the general maritime law. The Court, in the *Haverty* case, went to the very heart of the question when it held that the protection to men engaged upon the same maritime duties should not be varied because of the accident of their being employed by a stevedore rather than by the ship. The *Haverty* case leaves no room for doubt but that whatever the term "seamen" may mean in other matters, insofar as personal injuries are concerned, and particularly with respect to the right of indemnity for those personal injuries, there is no reason to deprive a longshoreman of the same rights accorded to a member of the crew. As the Court of Appeals pointed out below, the stevedore is working in marine employment and is subject to all the risks for the time being. The fact that the exigencies of modern commerce have called in additional help for loading and unloading does not make the undertaking any less a marine transaction and rightly subject to the rules of law for the protection of workers who take the risks of such transactions.

We respectfully submit that the shipowner owes the same duty to a stevedore, to provide seaworthy appliances, as he does to the members of the crew.

The General Rules of the Maritime Law Apply Whether the Proceeding Be Instituted in an Admiralty or Common Law Court.

Petitioner contends very strenuously that the warranty of seaworthiness is an admiralty doctrine and has no application in an action on the civil side of the Court. This contention was raised for the first time in the Court of Appeals below on petition for re-hearing after the opinion was rendered by that Court. A brief review of the authorities

discloses beyond any doubt the lack of any merit in this contention. To begin with, the petitioner confuses a litigant's rights with the remedies available to him for the enforcement of those rights. In *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 62 L. Ed. 1171, the Court distinguished between rights and remedies as follows:

> "The distinction between rights and remedies is fundamental. A right is a well-founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Bouvier's Law Dict. Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law."

In passing on the very contention which has been here raised by the petitioner, the Court in the *Chelentis* case said:

> "The contract of a seaman is maritime and has written into it those peculiar features of the maritime law that were considered in the case of The Osceola, 189 U. S. 158, 47 L. ed, 760, 23 Sup. Ct. Rep. 483; and although, because of these peculiarities, such contracts are almost invariably litigated in admiralty courts, still the contract must be the same in every court, maritime or common law. The only difference between a proceeding in one court or the other would be that the remedy would be regulated by the lex fori."

The question was most recently undertaken by this Court in the case of *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 87 L. Ed. 239, in which case the same counsel for petitioner here raised the same contention there. Petitioner suggests now that the *Garrett* case is not controlling because it involves only a Federal Statute and not a right arising out of the general maritime law. We submit that even if that suggestion be correct, it would not alter the basic principles involved, but we cannot leave unchallenged the petitioner's premise since the argument in the *Garrett*

case involved not just a question of the applicability of the Jones Act, but rather the maritime rule of law which provides that the burden of proof is on the shipowner and not on the seaman, in testing the validity of a seaman's release. Moreover, the *Garrett* case involved a verdict for maintenance and cure; entirely aside of the verdict for damages. There is no other right which is more deeply rooted in the admiralty law than the right to maintenance and cure. It is quite evident, therefore, that the *Garrett* decision involves not only a Federal Statute, but also the most basic rights arising under the maritime law. An excerpt from the opinion in that case eliminates the necessity for further argument on the point as follows:

> "It must be remembered that the state courts have concurrent jurisdiction with the federal courts to try actions either under the Merchant Marine Act or in personam such as maintenance and cure. The source of the governing law applied is in the national, not the state, governments. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law. And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State. So here, in trying this case *the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected.*". (Italics ours.)

In *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 66 L. Ed. 927, the cause of action was based on unseaworthiness and the suit brought in a common law Court. In holding that the admiralty rules prevailed, the Court said:

> "The general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common-law court. Chelentis v. Luckenbach S. S. Co. supra; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 159, 64 L. ed. 834, 838, 11 A. L. R. 1145, 40 Sup. Ct. Rep. 438."

We submit that it would be laboring the point to further argue the unsoundness of petitioner's contention in this respect. It is clear and settled that the substantive rights of the parties must be the same irrespective of the forum which they choose to litigate their differences. That the right to indemnity for unseaworthiness is a substantive right needs no argument.

Petitioner argues that, if the decision of the Court below be sustained, then the stevedores will have greater rights than the members of the crew because the latter cannot have the advantage of the warranty of seaworthiness on the civil side of the Court, but only in the admiralty. The utter unsoundness of this position is illustrated in the *Garrett* and other cases just cited.

Elsewhere in the petitioner's brief, it is urged that petitioner is really secondarily liable to the Bethlehem Companies. Whatever the merit in this contention may be it has no place in this argument inasmuch as it could not affect respondent's rights. That argument could, of course, be made in the Court below in the event the judgment is affirmed, and after the case is remanded.

One further argument has been advanced which requires some comment. It is suggested that there is an analogy between the problem involved here and the distinction which

has been recognized between stevedores and members of the crew in the Longshoremen's and Harborworkers' Compensation Act. We respectfully submit that if there be any analogy to be drawn from these circumstances it must be drawn in favor of respondent's contention here. The Longshoremen's and Harborworkers' Compensation Act recognizes that longshoremen and stevedores have been classified and considered as "seamen" generally and in excluding the members of the crew from the provisions of that Act, Congress specifically used the term "members of the crew", and not "seamen". It will be recalled that when Congress first drafted the Longshoremen's Act it included stevedores as well as members of the crew within the provisions of the Act and characterized them all as seamen. It was only because the members of the crew expressly asked to be excluded that Congress removed them from the provisions of the Act. *Warner* v. *Goltra*, 293 U. S. 155, 79 L. Ed. 254.

Conclusion

At the time of the accident involved in the case at bar, the respondent was engaged in performing a service of direct benefit to the vessel and one which formerly had been performed by a member of the crew. We think it would be unreasonable and contrary to the consistent trend of judicial authority to hold a vessel and her owner to a lesser degree of responsibility for the safety of the respondent as a stevedore than if he had been a member of the crew. Conceivably, a member of the crew may have been standing beside him, either supervising or assisting in the operation generally, and if as a result of the defective shackle the falling boom struck both the respondent and the member of the crew, we think it would be against all reason and logic to allow a recovery for the injuries of one and not the other. We submit that whatever the term "seamen" may be

construed to cover in other respects, at least in connection with the injuries which may be caused to stevedores by reason of unseaworthy appliances, a stevedore must be considered as a seaman and entitled to the protection of the warranty of seaworthiness.

Wherefore we respectfully submit that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 365.

October Term, 1945.

SEAS SHIPPING COMPANY, INC.,
Petitioner,

v.

JOSEPH SIERACKI,
Respondent.

PETITION FOR REHEARING ON BEHALF OF SEAS SHIPPING COMPANY, INC.

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IN THE

Supreme Court of the United States.

No. 365.

October Term, 1945.

SEAS SHIPPING COMPANY, INC.,

Petitioner,

v.

JOSEPH SIERACKI,

Respondent.

PETITION FOR REHEARING ON BEHALF OF SEAS SHIPPING COMPANY, INC.

To the Honorable, the Justices of the Supreme Court of the United States:

Seas Shipping Company, Inc., respectfully prays for a rehearing and reconsideration of the opinion of this Court which was handed down on April 22, 1946. The opinion of the Court was written by Mr. Justice Rutledge. A dissenting opinion was written by the late Mr. Chief Justice Stone. Mr. Justice Frankfurter and Mr. Justice Burton concurred in the dissent.

The case is of the utmost importance in the Maritime Law. The brief on behalf of the Respondent was served upon counsel for Petitioner on December 27, 1945 and filed with this Court on December 31, 1945. The case was listed for argument on January 2, 1946 and was reached for argument on January 3rd. It is obvious that there was not sufficient time between the date of the oral argument and the date the Respondent's brief was filed for counsel for the Petitioner to prepare, print and file a reply brief. For that reason, the only opportunity that the Petitioner had to

answer the argument made in the brief on behalf of the Respondent was at the oral argument before this Court. Mr. Justice Reed did not sit at the oral argument. He did not, therefore, hear the Petitioner's answers to the arguments made on behalf of the Respondent. Mr. Justice Reed apparently voted with four other Justices to affirm the judgment of the Circuit Court of Appeals. It is possible that if Mr. Justice Reed had heard the Petitioner's answers to the contentions on behalf of the Respondent in the case, as set forth in his brief, he might have been persuaded to join with the three dissenting Justices in the case and it would have been necessary either to affirm the decision of the Circuit Court of Appeals because of an equally divided Court, or to have listed the case for reargument after the return of Mr. Justice Jackson to the Court.

Your Petitioner earnestly requests a rehearing of the case for other reasons. Petitioner is of the belief that the major premise upon which the majority opinion is based is erroneous. We refer to the first sentence in the third paragraph on page 3 of the opinion of the Court, where the following appears:

> "There could be no question of petitioner's liability for respondent's injuries, incurred as they were here, if he had been in petitioner's employ rather than hired by the Stevedoring Company."

Near the bottom of the same page the following appears:

> "Respondent is equally insistent that the owner cannot slough off liability to those who do the vessel's work by bringing an intermediate contracting employer between himself and those workers."

Except for the fact that we admit that the Court properly summarizes the contentions of the Respondent, those statements are not correct. If Mr. Sieracki had been employed by the Petitioner as a stevedore, there is not an iota of doubt but that the Petitioner's liability for his injuries would have been exclusively that provided by the

Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901, et seq. Under such circumstances, Mr. Sieracki could not have maintained an action either at law or in Admiralty against his employer by reason of the unseaworthiness of his employer's vessel. Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, Section 905 of 33 U. S. C. A., is quite specific on this point:

> "The liability of an employer prescribed in Section 904 of this chapter *shall be exclusive and in place of all other liabilities of such employer to the employee*—". (Emphasis ours.)

The respondent was a longshoreman or stevedore. He was not the master or a member of the crew of the Steamship "Robin Sherwood". Those two classes of persons are the only ones who are excluded from the provisions of the Longshoremen's and Harbor Workers' Compensation Act, Section 2 of the Act, 33 U. S. C. A. 902, subsection 3, provides:

> "The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under 18 tons net."

The same section provides, subsection 4:

> "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

It is freely admitted by your Petitioner that if Mr. Sieracki had been a member of the crew of the vessel, he could have availed himself of the doctrine of unseaworthiness. He was not so engaged. He was a stevedore or longshoreman and whether he had been employed by an independent stevedoring contractor or the shipowner, his rights would be governed by the Longshoremen's and Harbor

Workers' Compensation Act in any claim he might make against his employer.

The opinion of the Court recognizes the applicability of the Longshoremen's and Harbor Workers' Compensation Act had the respondent been employed by the shipowner. In the first full paragraph on page 12 of the opinion, the following appears:

> "The legislation therefore did not nullify any right of the longshoreman against the owner of the ship, except possibly in the instance, presumably rare, where he may be hired by the owner."

We shall discuss hereinafter whether or not the presumption referred to in the quoted sentence from the opinion is correct. Suffice it to say at this time that the Petitioner never argued that the passage of the Longshoremen's and Harbor Workers' Compensation Act took away from a stevedore or longshoreman his rights against a third party tort feasor who was not his employer. The sole argument that the Petitioner sought to make with respect to the Longshoremen's and Harbor Workers' Compensation Act was that its passage created a line of demarcation between the old and the new. It cut off any remedy by a stevedore against his employer under the Jones Act, Merchant Marine Act of 1920, 46 U. S. C. A. 688, which had been enunciated by this Court in *International Stevedoring Co. v. Haverty*, 272 U. S. 50; 47 S. Ct. 19. It also constituted an express recognition by Congress of a difference between the two, based solely upon the nature of the employment. It is not our intention to reiterate here the arguments made in our brief. We believe that they are clearly enunciated in the dissenting opinion in this case.

We trust that our analysis has made it clear that it is, in our opinion, incorrect to say, as this Court says in the second paragraph on page 10 of the opinion:

> "It (obligation of owner to provide a seaworthy vessel) is one he cannot delegate. By the same token it

is one he cannot contract away as to any workman within the scope of its policy."

The shipowner, we have here shown, can contract away the obligation this Court would impose upon him by the decision in this case. He can do so merely by engaging in the stevedoring business and making the stevedores his employees. The operation of an Act of Congress does the rest. It limits his obligation for unseaworthiness and for his negligence to the payments of compensation provided under the Act.

Earlier in this petition we stated that the decision of the Court in this case was of the utmost importance in the Maritime Law. Just how important it is can be gleaned from a consideration of the maritime field as it exists today. Cargo ships are, roughly speaking, divided into two classes: tankers and dry cargo vessels. Tank vessels form a large percentage of the total tonnage of merchant vessels.[1] They are, in the vast majority of cases, owned and operated, in peacetime, by oil companies. Stevedores, as that name is properly used and generally understood in practice, do not engage in loading or discharging a tanker. Any work of this nature is performed by shore employees of the oil companies. Since these men are employed by the same company which owns and operates the ship, any remedy they might have for an injury sustained by reason of the unseaworthiness of their employer's vessel would be under the Longshoremen's and Harbor Workers' Compensation Act.

It is true that, during the recent war, most stevedoring work was done by independent local contractors and not by stevedores in the employ of a shipowner. That is not, however, standard peacetime practice in all cases. Counsel for Petitioner has no means of accurately ascertaining, within the time available, what proportion of steamship companies perform or performed their own stevedoring work,

1. Peacetime figures, furnished by the American Merchant Marine Institute, show the net tonnage of American flag tankers was 2,127,276 and the net tonnage of dry cargo vessels 2,170,724.

either directly or through the device of a subsidiary corporation. A review of some of the reported cases indicates that at least some shipowners do. The following reported cases involve stevedores employed by steamship companies:

Bull Insular Line, Inc., et al. v. Schwartz, Deputy Commissioner, et al., 23 F. Supp. 359;

Puget Sound Freight Lines, et al. v. Marshall, Deputy Commissioner, et al., 125 F. (2) 876;

Pacific Employers Insurance Company and Bay Transport Company v. Pillsbury, Deputy Commissioner, 130 F. (2) 21;

Smrekar, Jr., etc. v. Bay and River Navigation Company, et al., 160 F. (2) 85, Certiorari denied January 2, 1946, 66 S. Ct. 338.

There are undoubtedly others. To the personal knowledge of counsel for the Petitioner, at least one large steamship company conducted stevedoring operations and had a stevedoring division within the same corporation which owned and operated its ships.[2] At least one other had and possibly still has a subsidiary corporation which does stevedoring work for its vessels.[3] Very probably there are others because the knowledge of counsel for Petitioner is limited and confined exclusively to the Port of Philadelphia.

The independent stevedoring contractor obtained his business from the smaller steamship lines, which were not large enough to maintain an independent stevedoring division or subsidiary corporation. One can understand a shipowner being willing to assume liability for injury to someone which is the result of his negligence. Negligence is, after all, something that he can guard against. A latent defect is something that cannot be guarded against. It is liability without fault. The end result of the doctrine enunciated by this Court in its opinion in the case at bar will

2. Moore-McCormack Lines, Inc.

3. Nacirema Operating Company (Nacirema is American spelled backwards) is a subsidiary of America-Hawaiian Steamship Company.

be that if a great number of claims are made against shipowners under it, the shipowner will protect himself by going into the stevedoring business and hiring the stevedores directly to perform the services on his vessel. To such men his liability will be limited by the applicable compensation statute, *Swanson v. Marra Bros., Inc.*, decided April 22, 1946. The Longshoremen's and Harbor Workers' Compensation Act will be the measure of his liability to such employees whether caused by negligence or not.

The independent stevedoring contractor, such as Sieracki's employer in the case at bar, will not be able to survive economically under such a system. The costs of compensation insurance are a part of the costs of doing business of the contracting stevedore and are passed along to his customer, the shipowner, so that the net result will be that the large steamship company will be able to make a profit, which now is made by the contracting stevedore, upon his stevedoring operations as well as upon his business as a carrier by water. The large companies will become larger. The small will not survive.

The ones who will be hurt most by the new doctrine enunciated by the decision in the case at bar will be the small shipowner and the contracting stevedore. We venture to say that in smaller ports, where steamship companies do not operate frequently, the independent stevedore will survive but that he will be unable to do so in such large ports as New York, San Francisco, New Orleans and Philadelphia.

There will thus grow up in the maritime field a situation where a stevedore will have one set of remedies when he works for one employer and another set when he works for another employer, or that the stevedore in New York will have remedies different from a stevedore in a smaller port. We submit that the result is neither desirable nor in keeping with the traditional policy of uniformity in the Maritime Law which this Court has always held to be an essential feature of it. *Garrett v. Moore-McCormack Co., Inc.*, 317 U. S. 239, and cases there cited in footnote 10.

At the oral argument we attempted to answer the Respondent's argument with respect to the historical background of the stevedore. We pointed out that the ancient *Consulato del Mare,* which is at least as old as the laws of Wisby and Oleron, referred specifically to a person who worked to stow or discharge the cargoes of ships. His name in the original Catalan is "stibador", the original, no doubt, of the word we use. Maclachlan on Merchant Shipping, 7th edition, page 336 (note). The argument that historically the work now done by stevedores was formerly done by members of the crew falls in the face of such positive evidence. The three cases cited in the majority opinion at the bottom of page 7 and the top of page 8 to support the historical argument, concern the question of a stevedore's lien and whether or not his contract for services is maritime. The statements concerning the historical background of the stevedore are not buttressed in those cases by authorities and we submit that the historical argument falls when it so clearly appears that the stevedore has, from the earliest times, been distinguished from the member of the crew who serves as a seaman.

The decisions of this Court in *South Chicago Coal and Dock Co., et al. v. Bassett,* 309 U. S. 251 and *Norton v. Warner Co.,* 321 U. S. 565, are clear recognitions by this Court of the fact that the mere presence of a person upon a vessel performing services connected with the vessel is not a separate and distinct ground for a new rule of liability. See also *Smrekar, Jr. v. Bay River Navigation Company,* supra, in which case this Court denied certiorari the day before the oral argument in the case at bar.

In our brief to this Court we argued that the doctrine of unseaworthiness was so peculiar to the Admiralty that it should only be enforceable there. This contention was dismissed very briefly in the opinion of the Court. We wish to point out that the cases cited as controlling that portion of the opinion, with one exception, involve liability under a statute and not under the general Maritime Law. We

respectfully submit that without the benefit of a statute enabling him so to do, a member of the crew of a vessel who relies entirely upon unseaworthiness for recovery is restricted to an action in Admiralty. As is said by Mr. Justice Douglas in writing the unanimous opinion of the Court in *Norton v. Warner Co.*, supra, at 570:

> "Moreover, seamen may sue under the Jones Act for injuries in the course of their employment. And in such actions, assumption of risk is no defense. Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424. *Or suit may be brought in Admiralty for injuries caused by unseaworthiness of the vessel or its appurtenant appliances and equipment.* Mahnich v. Southern Steamship Company, 321 U. S. 96, and cases cited. These are basic rights." (Emphasis ours.)

In conclusion, it is respectfully submitted that this case is a proper one for rehearing. It is understood that, under ordinary circumstances, where the Court is equally divided the judgment below is affirmed. In this case, the Circuit Court of Appeals did not have before it the full argument on the question which, it developed, was to be the deciding one in the case. The briefs of both counsel before the Circuit Court of Appeals were directed mainly to the question of negligence and not to whether a stevedore might come within the scope of the warranty of seaworthiness. The Circuit Court of Appeals stated that its decision extended the doctrine beyond its then existing limits. The change in the personnel of this Court since the decision adds difficulty to the problem of granting a rehearing. This difficulty should not persuade the Court to stand by a decision which raises problems so far beyond the confines of the particular case. The absence of Mr. Justice Reed at the time of the oral argument before this Court may have been an important factor in determining the final decision. The matter is so important and such a novel doctrine in the Maritime Law that it should not be finally determined by a narrow margin

under such unusual circumstances. It is respectfully submitted that the question of enlarging the scope of the doctrine of seaworthiness, benevolent on the one hand and harsh on the other, is properly a matter for investigation and determination by Congress. No one case presents a sufficiently broad view of the entire situation to enable the Court to see the whole picture in its proper perspective. It is requested that this Court again consider the brief submitted on behalf of the Petitioner in the light of what has been said in the dissenting opinion and in this Petition for Rehearing and that this Court grant the Petition and permit rehearing and reargument.

Respectfully submitted,

ROWLAND C. EVANS, JR.,
JOHN B. SHAW,
THOMAS E. BYRNE, JR.,
Attorneys for Petitioner.

I hereby certify that the within Petition for Rehearing is filed in good faith and not for purposes of delay.

THOMAS E. BYRNE, JR.,
Attorney for Petitioner.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 365.

OCTOBER TERM, 1945.

SEAS SHIPPING COMPANY, INC.,
Petitioner,

v.

JOSEPH SIERACKI,
Respondent.

MOTION OF AMERICAN MERCHANT MARINE INSTITUTE, INC., MARITIME ASSOCIATION OF THE PORT OF NEW YORK, NATIONAL ASSOCIATION OF STEVEDORES, PACIFIC-AMERICAN STEAMSHIP ASSOCIATION, SHIPOWNERS' ASSOCIATION OF PACIFIC COAST, WATERFRONT EMPLOYERS' ASSOCIATION OF PACIFIC COAST AND ASSOCIATION OF AMERICAN SHIPOWNERS FOR LEAVE TO FILE ANNEXED BRIEF, *AMICI CURIAE*, ON PETITION FOR REHEARING.

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American Merchant Marine Institute, Inc.,
Maritime Association of the Port of New York,
National Association of Stevedores,
Pacific-American Steamship Association,
Shipowners' Association of Pacific Coast,
Waterfront Employers' Association of Pacific Coast, and
Association of American Shipowners.

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MOTION OF AMERICAN MERCHANT MARINE INSTITUTE, INC., MARITIME ASSOCIATION OF THE PORT OF NEW YORK, NATIONAL ASSOCIATION OF STEVEDORES, PACIFIC-AMERICAN STEAMSHIP ASSOCIATION, SHIPOWNERS' ASSOCIATION OF PACIFIC COAST, WATERFRONT EMPLOYERS' ASSOCIATION OF PACIFIC COAST AND ASSOCIATION OF AMERICAN SHIPOWNERS FOR LEAVE TO FILE ANNEXED BRIEF, *AMICI CURIAE*, ON PETITION FOR REHEARING.

To the Honorable, the Justices of the Supreme Court of the United States:

Now come the American Merchant Marine Institute, Inc., the Maritime Association of the Port of New York, the National Association of Stevedores, the Pacific-American Steamship Association, the Shipowners' Association of the Pacific Coast, the Waterfront Employers' Association of the Pacific Coast and the Association of American Shipowners and respectfully move that the Court grant leave to file the annexed brief, *amici curiae*, and that the Court consider

it upon the Petition for Rehearing on behalf of Seas Shipping Co., Inc.

The written consent of Petitioner to the filing of this brief has been filed with the Court pursuant to Rule 27, Paragraph 9. Respondent, as evidenced by the annexed letter from his counsel, has declined to consent.

The American Merchant Marine Institute, Inc., is a New York membership corporation of American merchant shipowners and operators numbering seventy members and owning or operating 4,550,266 gross tons of all types of American Flag ships in the foreign and coastwise deepsea trades.

The Maritime Association of the Port of New York is an unincorporated association of all classes of shipping interests and moves here on behalf of its fifty-six contracting stevedore members in the Port of New York who do 75% of the stevedoring work of that port.

The National Association of Stevedores is a nationwide association of contracting stevedores with eighty-five members who employ approximately 65 to 70% of all stevedoring labor in the United States.

The Pacific-American Steamship Association is a California corporation with a membership of fifteen Pacific Coast steamship companies engaged in offshore, intercoastal, and Alaska trades.

The Shipowners' Association of the Pacific Coast is a California corporation comprising twenty-one members all engaged in Pacific coastwise operations.

The Waterfront Employers' Association of the Pacific Coast is a California corporation having one hundred forty members engaged in steamship, stevedoring or terminal operations on the Pacific Coast.

The Association of American Shipowners is an unincorporated association comprising sixteen Amer-

ican steamship companies owning or operating American Flag freight and passenger vessels in the foreign and coastwise deep sea trades.

As evidenced by the affidavit of Frank J. Taylor annexed to the brief, leave to file which is requested, the inevitable effect of the instant decision of the Court will be to create a great dislocation of the entire maritime industry, handicapping steamship operators in the conduct of their business and driving many independent contracting stevedores out of business. All of these effects, as is shown in the brief, will be without any corresponding benefit to the longshoremen who as a class might appear to be the beneficiaries of the social policy underlying the decision.

Respectfully submitted,

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Maritime Association of the Port of New York,
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Waterfront Employers' Association of Pacific Coast and
Association of American Shipowners.

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BRIEF OF AMERICAN MERCHANT MARINE INSTITUTE, INC., MARITIME ASSOCIATION OF THE PORT OF NEW YORK, NATIONAL ASSOCIATION OF STEVEDORES, PACIFIC-AMERICAN STEAMSHIP ASSOCIATION, SHIPOWNERS' ASSOCIATION OF PACIFIC COAST, WATERFRONT EMPLOYERS' ASSOCIATION OF PACIFIC COAST AND ASSOCIATION OF AMERICAN SHIPOWNERS, *AMICI CURIAE*, ON PETITION FOR REHEARING OF SEAS SHIPPING CO., INC.

Scope of This Brief.

The sole concern of the *amici curiae*, who severally represent practically all of both American-Flag steamship operators and independent contracting stevedores,[1] is with the effect of the decision of the major-

[1] It is customary in the maritime industry to refer to independent contractors who undertake the whole job of loading or discharging cargo as "stevedores"; laborers actually engaged in this work as employees are known as "longshoremen." The words "stevedore" and "longshoreman" will be used throughout this brief in this generally accepted sense, which is consistent with the use of the word "longshoreman" in the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., Sec. 901 *et seq.*

ity of the Court upon stevedoring operations in American harbors. As will be shown, *infra*, this decision will seriously dislocate the entire American maritime industry, to the substantial detriment of both steamship operators and the contracting stevedores and without any offsetting benefit to longshoremen. It is believed that, if the attention of the Court had been invited to these effects of its decision in this case of first impression, a contrary result would have been reached. It is not considered necessary to make the customary statement of facts, the questions involved, etc., as these details are already before the Court and in any event are adequately presented in the Petition for Rehearing.

Summary of Argument.

I—The Court overlooked the effect of the Longshoremen's and Harbor Workers' Compensation Act in holding that a longshoreman employed by an independent contracting stevedore is a "seaman" entitled to recover against a vessel owner under a warranty of seaworthiness for injuries sustained on board resulting from a non-negligent failure of ship's tackle.

II—The vessel owner *can* divest himself of the liability to longshoremen for unseaworthiness established by this case.

III—The entire maritime industry will be dislocated by this decision without corresponding benefit to the class sought to be aided.

ARGUMENT.

I.

The Court overlooked the effect of the Longshoremen's and Harbor Workers' Compensation Act in holding that a longshoreman employed by an independent contracting stevedore is a "seaman" entitled to recover against a vessel owner under a warranty of seaworthiness for injuries sustained on board resulting from a non-negligent failure of ship's tackle.

At page 3, the majority opinion states:

> "There could be no question of petitioner's liability for respondent's injuries, incurred as they were here, if he had been in petitioner's employ rather than hired by the stevedoring company."

With this statement we fully agree: *if* Respondent had been a member of the crew—a real seaman or mariner. In that event the owner would have been liable without limitation of damages, despite the fact that the latent defect in the shackle causing his injury could not have been discovered by the exercise of the fullest diligence, under the accepted doctrine that, as to crew members, the owner is an insurer of the seaworthiness of the vessel and her tackle. *The Osceola*, 189 U. S. 158 (1902). However, if, as is the present case, the employee had been a longshoreman or other harbor worker (including any employee of the vessel owner not a member of the crew), the shipowner employer would be liable only under an exclusive compensation statute. Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C.,

Sec. 901 *et seq.* No question of lack of seaworthiness would be raised; the employer's liability would rest solely on the fact of employment as a longshoreman or harbor worker upon navigable waters.

In effect, the Court holds that the fortuitous fact that Respondent was employed by an independent contractor enlarges his remedies. He has his statutory remedy, without the necessity of showing any fault, against the employing stevedore contractor. In addition, under the novel doctrine of this decision, he can also hold the innocent and non-negligent shipowner liable because of a lack of seaworthiness which the exercise of the fullest diligence failed to detect, a liability which he could not assert if he had been employed directly by the shipowner.[2]

We do not question the settled policy that as between innocent victims of an industrial accident, the employer is in the better position to shoulder and "to distribute loss in the shipping community which receives the service and should bear the cost" (Op., p. 6). Such is the policy of the Longshoremen's and Harbor Workers' Compensation Act. We also emphatically agree that "when a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights" (Op., p. 8). But it is the *nature* of his maritime service which should be controlling, and in that respect the Congress has established the policy that a distinction should be drawn between crew members and long-

[2] It is probably unnecessary to point out that the Respondent also has a judgment for the full amount of his damages against two solvent shipbuilders whose negligence was responsible for the accident.

shoremen. By overlooking this distinction, and the *exclusive* remedy features of the Longshoremen's Compensation Act, the Court is permitting just such fortuitous employment of the Respondent by a stevedoring contractor to enlarge his rights as against the vessel owner.

In finding the Respondent to be a "seaman" and thus entitled to hold a shipowner absolutely liable without fault because of unseaworthiness, the majority opinion reasons that the work of a longshoreman is of such a character and so closely allied to that of a mariner or seaman that it is justifiable to call him a seaman for the purpose of this seaman's remedy. The Court therefore concludes that the vessel-owner is liable to a longshoreman as he would be to a mariner or "sea-going" seaman, even though the longshoreman is employed by an independent stevedore.

Passing for the moment the fact that the Respondent by statute would have had no such remedy if he had been employed by the vessel owner *as a longshoreman* (a capacity in which he was in fact engaged), the Court's argument rests on the assumption that the Respondent's duties were analogous to some ancient and no longer practiced duties of a real seaman. However, as is shown by the annexed affidavit of Henry Russell Patterson, seamen long ago ceased to perform the work now done by the independent stevedore and his longshoremen, and under present day requirements could not even begin to do the work performed by them. There are not enough available men on a ship to work one hatch for one shift let alone five hatches with frequent night loading and discharging necessitating a second shift. For many years before *The Osceola* decision in 1902, stowage and discharge of cargo were customarily done by landsmen—the long-

shoremen, or stevedores. When *The Osceola* decided that sea-going personnel should have the protection of liability without fault for unseaworthiness, they were no longer performing the cargo handling or stevedoring functions. And the longshoremen who were working the cargo were generally employees of independent contractors.[3] To analogize them now to sea-going personnel, as against all other invitees on board a ship, because at one time cargo handling was performed by the crew, loses sight of the fact that the separation of function occurred long before the warranty of seaworthiness doctrine was established, and also of the fact that longshoremen in reality are landsmen and should be classed (as Congress did in the Longshoremen's Compensation Act) with all other harbor workers who perform various tasks about ships in port.[4]

In addition to the historical separation of the nature of a seaman's duties and those of a longshoreman, it is submitted that an analysis of longshoremen's work today requires the conclusion that they be considered in the same category as any other shoreside industrial occupation and distinguished from members of the crew. Harbor workers face none of the hazards of the sea. A sailor told to go aloft in a storm to secure

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[3] On the other hand the Court's information that the instances where the vessel owner hires the longshoremen directly are "presumably rare" is inaccurate as shown in the Taylor affidavit annexed hereto.

[4] In fact, the unions of both the seamen and the longshoremen resist any attempts to have one class perform any work considered by custom, or specifically provided by the collective bargaining contracts, to be the work of the other. Thus, the crew of an American vessel would probably refuse to lift on board and stow a single case of goods arriving at the pier just before sailing time and after the longshoremen had left.

loose gear endangering the ship does not tell the mate he does not like the strength of the rigging. He goes up the mast. Were it not so, no ship would be seaworthy, in fact as well as in law, because of an undisciplined, disobedient crew. It is for this reason that the vessel owner first was held to a high degree of care to see that all parts of a ship and all appliances were fully suited to their intended use, and then later was made an insurer of their seaworthiness. The sailor at sea cannot get off and has no alternative but to accept the equipment furnished him. Convenience of judicial administration required that the same rule apply to crew members in port, but the extension of the doctrine to other workers on a ship in port who are free to leave their employment at any time is an unwarranted extension of seagoing standards to what is essentially a shoreside industry.

Industrial employers ashore are held only to a duty of care and are not liable without negligence to their employees or invitees on their premises. A dividing line must be drawn somewhere. It is submitted that this line should be so drawn to separate sea-going personnel from landsmen as was done by the Congress in the Longshoremen's and Harbor Workers' Compensation Act. The longshoreman is essentially a shoreside cargo-handler whether working in a ship's hold, her deck, on the pier, loading freight cars or trucks, and his duties are analogous to and he is interchangeably employed as a freight handler in railroad stations, warehouses, etc. That no proper social purpose is served by the result reached is indicated by law review criticism of the decision of Circuit Court of Appeals for the 3rd Circuit, which this Court affirmed in this case. Thus

45 Col. L. Rev. 957, 960 (1945):

"His interests were considered basically those of

a landsman—not subject to the peculiarities of a seaman's contract and adequately protected by a compensation statute. It may be concluded, therefore, that his needs do not warrant affording him more protection than that assured to other land employees.[21]"

"[21] It may be noted in conclusion that modern law has developed the policy of imposing strict liability as part of a social philosophy which places the burden of the more or less inevitable losses due to socially desirable conduct upon those best able to bear them—or has shifted them to society at large. Pound, *The End of Law as Developed in Legal Rules and Doctrines* (1914) 27 Harv. L. Rev. 195. This is the basis of insurance and workmen's compensation. Therefore it logically follows that where an employee [as in the instant case] is protected by an existing compensation law, he is being given the advantage of liability without fault, and any additional imposition of such protection is a duplication of a legal benefit."

59 Harv. L. Rev. 127, 128 (1945):

"Any burden of absolute liability should rest on sound social and economic requirements, especially when other common law and statutory remedies are available. Furthermore, the peculiar relationship which may be used to sustain the shipowner to a very high degree of care when the rights of a sailor are concerned does not exist between the shipowner and a longshoreman."

In conclusion it is submitted that the Court should follow the traditional and practical dividing line between landsmen and those who go to sea, a line which is followed by the Congress in the Longshoremen's and Harbor Workers' Compensation Act. It follows that the Court should deny to longshoremen the special protection of the doctrine of unseaworthiness,[3] particularly since it is available only to those who are employed by independent contractors and not by vessel owners.

II.

The vessel owner *can* divest himself of the liability to longshoremen for unseaworthiness established by this case.

At page 10 of the Opinion the majority say:

> "Nor does it follow from the fact that the stevedore gains protections against his employer appropriate to the employment relation as such, that he loses or never acquires against the shipowner the protections, not peculiar to that relation, which the law imposes as incidental to the performance of that service. Among these is the obligation of seaworthiness. It is peculiarly and exclusively the obligation of the owner. It is one he cannot delegate. By the same token it is one *he cannot contract away as to any workman within the scope of its policy.*" (Italics supplied.)

[3] The seafaring man, while having a warranty of seaworthiness, has no compensation statute. The instant decision really makes the longshoreman the most favored class of any workingman.

It is again submitted that the Court has overlooked the provisions of the Longshoremen's and Harbor Workers' Compensation Act. By the simple procedure of dispensing with the employment of the contracting stevedore and hiring the necessary longshoremen directly as his own employees, the vessel owner can under the policy and specific provisions of the compensation statute relieve himself not only of the new liability for unseaworthiness created by this decision but also of his long-standing liability for injuries caused by negligence. This point is brought out fully in the Petition for Rehearing and need not be labored here.

III.

The entire maritime industry will be dislocated by this decision without corresponding benefit to the class sought to be aided.

As shown in the annexed affidavit of Frank J. Taylor, this decision as it now stands imposes a large and new burden upon the shipping industry. For a liability limited to negligence—which through diligence can always be guarded against—there is substituted the liability of an insurer. The increase in cost will be substantial. Protection and indemnity insurance rates can be expected to increase. The shipowner, who in the face of post-war foreign competition will be soon faced with the problem of saving everywhere to make both ends meet, will be forced to overhaul his methods of handling cargo. As many have already done, a great many operators have expressed their intention of doing their own stevedoring which, as has been pointed out, cuts off

the present right of the longshoremen employed by an independent stevedore to bring third-party actions against the vessel owner. All longshoremen will then have only their workmen's compensation and will lose their present right to recover against the shipowner for injuries caused by negligence.

The shipping trade will lose the skill of the independent stevedoring companies which have specialized in the work for years. Also lost will be a considerable amount of the flexibility afforded by the present system.

On the contracting stevedore's side, he stands to lose many of his customers because, by avoiding this new liability, they will now be able to do the work more cheaply than he. Many of the stevedores may be forced to suspend operations.

All of this might be faced with equanimity if the Court's decision would accomplish the desired social purpose, but when the longshoreman, through the simple expedient of changing his employer, benefits naught, it is submitted that the Court should be reluctant to extend the present liabilities of shipowners.

Throughout the opinion of the Court runs the thread of disapproval of attempts at insulation of liability to employees by the interposition of an independent contractor employer. The Courts have been properly vigilant to strike down such attempts wherever possible. Here there is no such attempt. The shoe is on the other foot, and it is only such interposition that gives rise to any cause of action. Nor can any vessel owner who feels compelled to hire longshoremen directly be criticized therefor, because he is merely availing himself of a statute passed by Con-

gress to protect the interests of the longshoremen by affording them certainty of compensation for accidental injuries arising out of their employment from any cause whatsoever.

Conclusion.

A rehearing should be granted in this case because:

1. The Court overlooked the effect of the Longshoremen's and Harbor Workers' Compensation Act in holding that a vessel owner's liability for unseaworthiness should exist in favor of a longshoreman employed by an independent stevedore on the apparent assumption that such liability would exist in favor of a longshoreman employed directly by the vessel owner. The exclusive remedy provisions of Section 5 of that Act would exclude any action based on unseaworthiness in the latter case.

2. The Court overlooked the fact that a vessel owner can contract himself out of the liability of the instant decision by employing his longshoremen directly.

3. The Court was not informed of the true historical nature of the longshoremen's employment, the separation of their functions from those of seafaring men long before the doctrine of the owner's warranty of seaworthiness was established, nor the frequency of their direct employment by vessel owners.

4. The Court was not informed of the dislocation of the maritime industry that will be occasioned by the decision as it now stands, all without any benefit

to the longshoremen, apparent beneficiaries of the decision, who are already protected by a fair compensation statute.

Respectfully submitted.

JOHN J. BURNS.

FRANCIS S. WALKER,
Attorneys for:
American Merchant Marine Institute, Inc.,
Maritime Association of the Port of New York,
National Association of Stevedores,
Pacific-American Steamship Association,
Shipowners' Association of Pacific Coast,
Waterfront Employers' Association of Pacific Coast, and
Association of American Shipowners,
Amici Curiae.

May, 1946.

APPENDIX.

IN THE

SUPREME COURT OF THE UNITED STATES,

No. 365.

OCTOBER TERM, 1945.

SEAS SHIPPING COMPANY, INC.,

Petitioner,

v.

JOSEPH SIERACKI,

Respondent.

AFFIDAVIT OF FRANK J. TAYLOR.

State of New York,
County of New York—ss.:

FRANK J. TAYLOR, being duly sworn, deposes and says:

1. He is President of the American Merchant Marine Institute, Inc., with offices at 11 Broadway, New York, New York, having served in that capacity since its organization in 1938. The Institute is a

membership organization of 70 companies engaged in all forms of deep sea and coastwise transportation, who own or operate a total of 4,550,266 gross tons of shipping under the American Flag.

2. On May 13, 1946, I sent telegrams to all member companies of the Institute engaged in the dry cargo service, inquiring as to their customary practices with respect to performing their own stevedoring work or engaging independent stevedoring contractors. Based on the telegraphic replies received in time for the execution of this affidavit, the following table sets forth, by companies, how their stevedoring work is performed:

Company	Performs own stevedoring in its principal ports and engages independent contractors in other ports.	Stevedoring done exclusively by independent contractors in U. S. ports.
Atlantic Gulf and West Indies Steamship Lines	[1]	
Alcoa Steamship Co.		X
American Export Lines, Inc.		X
American President Lines		X
American South African Line		X
American West African Line	X[2]	
Black Diamond Steamship Corp.		X
Calmar Steamship Corp.		X
Chile Steamship Co., Inc.		X
Grace Line, Inc.	X[3]	
International Freighting Corp.		X
Isthmian Steamship Co.		X
Lykes Bros. Steamship Co.	X	
Marine Transport Lines, Inc.		X
Matson Navigation Co.	X[4]	
Mississippi Shipping Co.	X[5]	
Moore-McCormack Steamship Co.	X[6]	
Seas Shipping Co.		X
South Atlantic Steamship Line	X[7]	
Southern Steamship Co.		X
Stockard Steamship Co.		X
Sword Line, Inc.		X
Union Sulphur Co., Inc.		X
United Fruit Co.	X[8]	
United States Lines Co.	X[9]	
Wilmore Steamship Co.		X

[1] Did own stevedoring before war and plans to operate for experimental period with independent stevedores to compare efficiency.

[2] Does own stevedoring at New York through an affiliate.

[3] Does own stevedoring at San Francisco and part at New York.

[4] Does own stevedoring at Los Angeles, San Francisco, Seattle and Tacoma.

[5] Does own stevedoring at New Orleans.

[6] Does own stevedoring at New York and Philadelphia.

[7] Does own stevedoring at New Orleans, Mobile, Pensacola, Jacksonville, Savannah, Brunswick, Galveston and Houston.

[8] Does own stevedoring at New York, New Orleans, Boston, Philadelphia, Baltimore and Charleston.

[9] Does own stevedoring at Baltimore only.

3. If the present decision of the Supreme Court in this case is permitted to stand, with the resultant liability of a vessel owner to longshoremen employed by an independent stevedore for any injuries sustained by such longshoremen occasioned by an unseaworthy condition of the vessel, it is my opinion, and that of those steamship operating personnel with whom I have discussed the matter, that the premium rates for protection and indemnity insurance (which covers the vessel owner's liability in such cases) will necessarily be substantially increased. Those companies which act as self-insurers anticipate a substantial increase in their costs.

4. I have been advised by counsel that if the longshoremen engaged in working cargo upon a vessel were employed directly by the vessel owner, this new liability for non-negligent injury because of unseaworthiness, as well as the previously recognized liability for negligent injury, would be avoided, and that the vessel owner's liability would be restricted to that provided by the Longshoremen's and Harbor Workers' Act.

5. As a result of these anticipated substantial increases in costs of cargo handling, and the fact that such increases can be avoided by employing the longshoremen directly, many vessel operators now employing contracting stevedores have indicated their present intention of dispensing with the independent stevedore and of performing the stevedoring function directly through their own longshore employees. Many other companies have not yet had time to come to such a conclusion but are investigating the relative

costs of this increased liability and the intra-company feasibility of setting up a stevedoring operation. In my opinion, such a drastic change in the method of performing stevedoring operations cannot help but work a dislocation of the maritime industry in American harbors at a time when it is of the greatest importance to American foreign trade to maintain flexibility and continuity of operations.

FRANK J. TAYLOR.

Subscribed and sworn to before me
this 15th day of May, 1946.

RUTH HARLAN,
Notary Public,
New York County.
N. Y. Co. Clk's No. 369; Reg. No. 765-H-7
Commission Expires March 30, 1947.

IN THE

SUPREME COURT OF THE UNITED STATES,

No. 365.

OCTOBER TERM, 1945.

SEAS SHIPPING COMPANY, INC.,
Petitioner,

v.

JOSEPH SIERACKI,
Respondent.

AFFIDAVIT OF HENRY RUSSELL PATTERSON.

State of New York,
County of New York—ss.:

HENRY RUSSELL PATTERSON, being duly sworn according to law, deposes and says:

1. I am Vice-President of The Jarka Corporation, Stevedores and Marine Terminal Operators, with offices at 15 Whitehall Street, New York, New York.

2. In 1896 I enrolled in the New York State School Ship "St. Mary's", and since that time I have been continuously and actively engaged in the maritime industry. My experience at sea includes service as a seaman on a full-rigged ship and on coasting schooners; as quartermaster and boatswain for the Morgan Line; nineteen years as a licensed deck officer for American-Hawaiian Steamship Co., the last ten

years as master; one year as Lieutenant Commander, United States Naval Reserve, commanding troop transports; and one year as master for the United States Mail Steamship Co., a predecessor of the present United States Lines. Since 1922 I have been connected with The Jarka Corporation as Pier Manager and Supervisor of Stevedoring in New York. In the course of such work I have been in charge of all stevedoring in New York for such lines as North German-Lloyd, Hamburg-American, Holland-American, American-Hawaiian, Isthmian, Newtex, and others. The Jarka Corporation also operates in Searsport and Portland, Maine, Boston, Port Newark, Philadelphia, Baltimore, and, through a subsidiary, Norfolk and Newport News, and I am extremely familiar with stevedoring operations in all those harbors. My connection with The Jarka Corporation was interrupted for the four-year period of 1942 through 1945, during which I served as Captain, United States Naval Reserve. In the course of this service I had charge of the training of stevedores for the Navy, and later supervised thirty-eight battalions of stevedore CB's in the Pacific.

3. On the basis of my experience, both at sea and ashore, I am familiar with established practices with respect to loading and discharging cargo, and the relative functions performed by members of a vessel's crew and shore gangs of longshoremen.

4. References to the use of landsmen, rather than crew members, to discharge cargo are found as far back as Venetian days. There was no fixed time when

this practice became general, but the development was a gradual one which followed from the enlargement of port facilities as harbors increased in importance, and also from the increasing size of cargo vessels and their greater dependence on machinery rather than manpower for their operations. Certainly within my experience over the last fifty years since 1896, it has never been considered that loading and discharging cargo is a duty of the ship's crew, and I question whether it would even be permitted under a modern maritime union contract unless necessary for the safety of the vessel. The newspapers reported several significant examples during the recent war of the refusal of merchant vessel crew members to discharge cargo even in combat areas.

5. The large number of men required for efficient discharge of cargo makes it clear that this work could not under any circumstances be properly performed by the small deck force available on a modern merchant vessel. Taking the Victory ship as an example, the official manning scale calls for a deck force, exclusive of licensed officers, of one carpenter, one boatswain, six able seamen, three ordinary seamen, and two deck maintenance men, a total of thirteen. As against this, a total of seven gangs averaging twenty-three men each are required for the efficient discharge of cargo from the five hatches of a Victory ship, a total of 161 men. If the work is to be done continuously, two shifts are necessary, or a total of 322 men. And each of the seven gangs is composed of specialists: one foreman, eight men in the hold, four winch-drivers and gangwaymen on deck, two slingers

on the stringpiece, six men on the dock, and two tractor-drivers. All the members of such gangs, performing the same type of work day after day, obviously acquire skills which could not be matched by crew members, however competent they may be in their own work of seamanship.

H. R. PATTERSON.

Subscribed and sworn to before me
this 15th day of May, 1946.

RUTH HARLAN,
Notary Public,
New York County.
N. Y. Co. Clk's No. 369, Reg. No. 765-41-7.
Commission Expires March 30, 1947.

LETTERHEAD OF

FREEDMAN, LANDY AND LORRY
1015 Chestnut Street
Philadelphia 7, Pa.

May 14, 1946

Messrs. Burns, Currie, Walker and Rich,
40 Wall Street,
New York 5, N. Y.

Attention: Francis S. Walker, Esquire
Re: Seas Shipping Company vs. Sierracki

Dear Mr. Walker:

This is to acknowledge receipt of your letter of May 11th requesting that we advise you whether we will consent to your filing a Brief as Amicus Curiae in the above matter.

We have very carefully considered your request, but feel that at this stage of the proceedings, any further action will only serve to unduly prolong the litigation. This is to advise, therefore, that we do not consent to the filing of a Brief as Amicus Curiae by you at this time.

Very truly yours,

FREEDMAN, LANDY AND LORRY
By /s/ Abraham E. Freedman

AEF:EK

0. 7.

SUPREME COURT OF THE UNITED STATES.

No. 365.—October Term, 1945.

Seas Shipping Company, Inc., Petitioner, *vs.* Joseph Sieracki.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[April 22, 1946.]

Mr. Justice Rutledge delivered the opinion of the Court.

The principal question is whether the obligation of seaworthiness, traditionally owed by an owner of a ship to seamen, extends to a stevedore injured while working aboard the ship.

Sieracki was employed by an independent stevedoring company which was under contract to petitioner to load its ship, the S.S. Robin Sherwood. On December 23, 1942, he was on the vessel loading cargo. The winch he operated was controlled by a ten-ton boom at number five hatch. One part of a freight car had been lowered into the hold. The second part weighed about eight tons. While it was being put down the shackle supporting the boom broke at its crown, causing the boom and tackle to fall and injure respondent.

He sued petitioner and two other companies. These were the Bethlehem Steel Company, to which the Maritime Commission had awarded the contract for constructing the ship, and Bethlehem Sparrow's Point, Inc., which had built part of the ship under agreement with the steel company. The District Court found that the shackle had broken as the result of a defect which had occurred in its forging. The Bethlehem companies had purchased this equipment from another concern. Nevertheless the court held they were negligent in not having tested it adequately before installing it. But the court considered petitioner to be under no such obligation to test[1] and therefore not negligent. Accordingly, it gave judgment against the two Bethlehem companies but in favor of petitioner. 57 F. Supp. 724.

The Circuit Court of Appeals reversed as to petitioner. 149 F. 2d. 98. Accepting the District Court's conclusion that it was

[1] Visual inspection would not have disclosed the defect.

not negligent, the Court of Appeals was of the opinion that respondent should recover for the ship's lack of seaworthiness. The opinion emphasized that the decision was novel, noting "statements and assumptions each way."[3] Because of the novelty and importance of the question we granted certiorari.[4] 326 U. S. —.

The finding that the ship was unseaworthy is not disputed. Petitioner says, first, that the doctrine of unseaworthiness is peculiar to admiralty and cannot be applied in a suit brought on the law side of the court. It also urges that in any event the liability may not be extended properly to the benefit of stevedores and longshoremen. And finally petitioner argues that if the doctrine is properly so applicable, its liability is only secondary to that of the Bethlehem companies which both courts found to be negligent; and therefore petitioner, the nonnegligent defendant, should not be held "jointly" liable with the negligent ones.

At the outset we may dismiss the first contention. It is now well settled that a right peculiar to the law of admiralty may be enforced either by a suit in admiralty or by one on the law side of the court. *Carlisle Packing Co.* v. *Sandager*, 259 U. S. 255, 259; *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 243-244; *Rhones* v. *Socony-Vacuum Oil Co.*, 37 F. Supp. 616.[5]

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[2] The District Court found "that the accident occurred by reason of the unseaworthiness of the vessel." 57 F. Supp. 724, 726.

[3] The references were to W. J. McCahan Co. v. Stoffel, 41 F. 2d 651, 654 (C. C. A. 3); Cassil v. United States Emergency Fleet Corp., 289 Fed. 774 (C. C. A. 9), suggesting liability; and, to the contrary, Panama Mail S. S. Co. v. Davis, 79 F. 2d 430 (C. C. A. 3); Bryant v. Vestland, 52 F. 2d 1078 (C. C. A. 5); Luckenbach S. S. Co. v. Buzynski, 19 F. 2d 871 (C. C. A. 5), rev'd on another ground, 277 U. S. 226; The Howell, 273 Fed. 513 (C. C. A. 2); The Student, 243 Fed. 807 (C. C. A. 4); Jeffries v. DeHart, 102 Fed. 765 (C. C. A. 3); The Mercier, 5 F. Supp. 511, affirmed, 72 F. 2d 1008 (C. C. A. 9).

[4] See in addition to the authorities cited by the Circuit Court of Appeals, 149 F. 2d at 102; Decision (1945) 45 Col. L. Rev. 957; (1945) 59 Harv. L. Rev. 127; (1946) 19 Temp. L. Q. 336, 339.

[5] Nothing in 28 U. S. C. § 41(3) is to the contrary. The section provides that federal district courts shall have jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it. . . ." This does not mean that where suit is brought at law the court is restricted to the enforcement of common-law rights. Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 384; Panama R. Co. v. Johnson, 264 U. S. 375, 387-388; Panama Refining Co. v. Vasquez, 271 U. S. 557, 560-561. "When a cause of action in admiralty is asserted in a court of law its substance is unchanged." Panama Agencies Co. v. Franco, 111 F. 2d 263, 266.

Equally unavailable is the contention concerning the secondary character of petitioner's liability. That liability, if it exists, not only sounds in tort;[6] but rests upon an entirely different basis from that upon which recovery has been had against the Bethlehem companies. Such a liability therefore would be not joint but several and the judgment of the Court of Appeals obviously went on this view. Moreover the contention necessarily affects the Bethlehem companies, at any rate in relation to possible claim of indemnity by petitioner. They have not been named as respondents here or served in accordance with Rule 38(3). Consequently we are precluded from making any determination concerning their rights or liabilities, with relation either to petitioner or to respondent.

The nub of real controversy lies in the question whether the shipowner's obligation of seaworthiness extends to longshoremen injured while doing the ship's work aboard but employed by an independent stevedoring contractor whom the owner has hired to load or unload the ship.

There could be no question of petitioner's liability for respondent's injuries, incurred as they were here, if he had been in petitioner's employ rather than hired by the stevedoring company. That an owner is liable to indemnify a seaman for an injury caused by the unseaworthiness of the vessel or its appurtenant appliances and equipment has been settled law in this country ever since *The Osceola*, 189 U. S. 158. *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96, 99, and authorities cited. And the liability applies as well when the ship is moored at a dock as when it is at sea. See, *e. g.*, *The Edith Goddon*, 23 Fed. 43; *Wm. Johnson & Co.* v. *Johansen*, 86 Fed. 886; *The Waco*, 3 F. 2d 476.

Petitioner insists, however, that the obligation flows from and is circumscribed by the existence of the contract between the owner of the vessel and the seaman. Accordingly, since there was no such contract here, it says respondent cannot recover. Respondent is equally insistent that the owner cannot slough off liability to those who do the vessel's work by bringing an intermediary contracting employer between himself and those workers. In respondent's view the liability is an incident of the maritime ser-

[6] Cf. text *infra*; Cortes v. Baltimore Insular Line, 287 U. S. 367; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52.

vice rendered, not merely of the immediate contractual relation of employment, and has its roots in the risks that service places upon maritime workers and in the policy of the law to secure them indemnity against such hazards.

Obviously the norm of the liability has been historically and still is the case of the seaman under contract with the vessel's owner. This is because the work of maritime service has been done largely by such persons. But it does not follow necessarily from this fact that the liability either arose exclusively from the existence of a contractual relation or is confined to situations in which one exists.

The origins are perhaps unascertainable.[7] But that fact in itself may be some evidence that contract alone is neither the sole source of the liability nor its ultimate boundary. For to assume this would be at once to project ideas of contract backward into centuries governed more largely than our own by notions of status,[8] and to exclude from the protection all who do the work of the sea without benefit of contract with the owner. It may be doubted, for example, that he has ever been able to escape liability to impressed seamen, in whose cases to speak of "contract" would only rationalize a responsibility imposed regardless of consensual relationship. And it would hardly seem consistent with the obligation's benevolent purposes[9] that the

[7] It has been suggested that "the seaman's right of indemnity for injuries caused by defective appliance or unseaworthiness seems to have been a development from his privilege to abandon a vessel improperly fitted out." The Arizona *v.* Anelich, 298 U. S. 110, 121, note 2; Mahnich *v.* Southern S. S. Co., 321 U. S. 96, 99; cf. The Osceola, 189 U. S. 158.

It does not follow that the right of abandonment would not exist if the seaman were hired by another at the instance of the vessel's owner, and no decision to which we have been referred so holds.

[8] See Maine, Ancient Law (1861). For a modern criticism, see Pound, Interpretations of Legal History (1930) 53 *et seq.*

[9] An excellent summary is given by Parker, J., in The State of Maryland, 85 F. 2d 944, 945:

"Seamen are the wards of admiralty, and the policy of the maritime law has ever been to see that they are accorded proper protection by the vessels on which they serve. In early days, this protection was sufficiently afforded by the enforcement of 'maintenance and cure.' Vessels and their appliances were of comparatively simple construction, and seamen were in quite as good position ordinarily to judge of the seaworthiness of a vessel as were her owners. . . .

"With the advent of steam navigation, however, it was realized, at least in this country, that 'maintenance and cure' did not afford to injured seamen adequate compensation in all cases for injuries sustained. Vessels were no longer the simple sailing ships, of whose seaworthiness the sailor was an adequate judge, but were full of complicated and dangerous machinery, the

owner might nullify it by the device of having all who man the ship hired by others willing to furnish men for such service at sea or ashore.

It is true that the liability for unseaworthiness is often said to be an incident of the seaman's contract. But in all instances which have come to our attention this has been in situations where such a contract existed.[10] Necessarily in such a setting the statement could have no reference to any issue over liability in the absence of such a contractual relation. Its function rather has been to refute other suggested restrictions which might be held to apply on the facts. Most often perhaps these have been limitations arising from the erroneous idea that the liability is founded in negligence and therefore may be defeated by the common-law defenses of contributory negligence, assumption of risk and the fellow servant rule. *Mahnich* v. *Southern S.S. Co.*, supra; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255.

Because rationalizing the liability as one attached by law to the relation of shipowner and seaman, where this results from contract, may have been thought useful to negative the importation of those common-law tort limitations does not mean, how-

operation of which required the use of many and varied appliances and a high degree of technical knowledge. The seaworthiness of the vessel could be ascertained only upon an examination of this machinery and appliances by skilled experts. It was accordingly held that the duty of the vessel and her owners to the seaman, in this new age of navigation, extended beyond mere 'maintenance and cure,' which had been sufficient in the simple case of sailing ships; that the owners owed to the seamen the duty of furnishing a seaworthy vessel and safe and proper appliances in good order and condition and that for failure to discharge such duty there was liability on the part of the vessel and her owners to a seaman suffering injury as a result thereof. The Osceola, 189 U. S. 158, 175. . . . In the Edith Godden (D. C.) 23 F. 42, 45, which dealt with the case of a seaman injured by a defective derrick, Judge Addison Brown pointed out that in dealing with injuries sustained by the use of modern appliances 'it is more reasonable and equitable to apply the analogies of the municipal law in regard of owners and masters, rather than to extend the limited rule of responsibility under the ancient maritime law, to these new, modern conditions, for which those limitations were never designed.' " See, in addition to the cited opinion of Judge Brown, his opinion in The City of Alexandria, 17 Fed. 390. See also Storgard v. France & Canada S.S. Corp., 263 Fed. 545, 547-548; The H. A. Scandrett, 87 F. 2d 708, 711.

[10] In all of the cases cited or found, except perhaps the stevedore cases cited in note 3, where the cause of action has been based upon unseaworthiness, there was a contract. The "implied warranty" on the part of a shipowner that a ship is seaworthy has been read not only into contracts made with seamen, Hamilton v. United States, 268 Fed. 15, 21, but also into contracts for the carriage of goods by sea, Bradley Fertilizer Co. v. The Edwin I. Morrison, 153 U. S. 199, 210-211, although this liability has been modified by the Harter Act, 27 Stat. 445, 46 U. S. C. §§ 189-195; and in rare instances perhaps also into contracts with passengers, cf. Muise v. Gorton-Pew Vessels Co., 1938 A. M. C. 714, 718; Rainey v. New York & P. S. S. Co., 216 Fed. 449, 453; Robinson, Admiralty (1939) 306, note 109.

ever, that the liability is itself contractual or that it may not extend to situations where the ship's work is done by others not in such an immediate relation of employment to the owner. That the liability may not be either so founded or so limited would seem indicated by the stress the cases uniformly place upon its relation, both in character and in scope, to the hazards of marine service which unseaworthiness places on the men who perform it. These, together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden, in so far as it is measurable in money, upon the owner regardless of his fault.[11] Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost.

These and other considerations arising from the hazards which maritime service places upon men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, analogous to other well-known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. *Mahnich* v. *Southern S.S. Co., supra*; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52; *Carlisle Packing Co.* v. *Sandanger, supra*. It is a

[11] Contributory negligence has never been a defense in suits brought by seamen to recover for injuries due to a ship's unseaworthiness but has been applied merely in mitigation of damages. Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424, 429; The Arizona v. Anelich, 298 U. S. 110, 122, and cases cited. And in The Max Morris, 137 U. S. 1, the Court held that in a suit for personal injuries brought in admiralty by a stevedore the admiralty rule of divided damages was applicable. It was said in The Arizona v. Anelich, at 122-123, with respect to the defense of assumption of risk: "The seaman assumes the risk normally incident to his perilous calling . . . , but it has often been pointed out that the nature and the practical difficulties of his avoiding exposure to the risks of unseaworthiness and defective appliances make such a defense . . . peculiarly inapplicable to suits by seamen to recover for the negligent failure to provide a seaworthy ship and safe appliances." As to the fellow servant rule, see Mahnich v. Southern S. S. Co., 321 U. S. 96, 100-103; The Frank and Willie, 45 Fed. 494, 495-496.

In this connection is pertinent also the frequently stated rule that the obligation of a shipowner to provide a seaworthy ship is nondelegable. See, e. g., Lord and Sprague, Cases on the Law of Admiralty (1926) 237, note 4; The Rolph, 299 Fed. 52, 55; Globe S. S. Co. v. Moss, 245 Fed. 54, 55.

form of absolute duty owing to all within the range of its humanitarian policy.

On principle we agree with the Court of Appeals that this policy is not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his consent or by his arrangement. All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection. The risks themselves arise from and are incident in fact to the service, not merely to the contract pursuant to which it is done. The brunt of loss cast upon the worker and his dependents is the same, and is as inevitable, whether his pay comes directly from the shipowner or only indirectly through another with whom he arranges to have it done. The latter ordinarily has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious or his own action creates them.[12] If not, no such obligation exists unless it rests upon the owner of the ship. Moreover, his ability to distribute the loss over the industry is not lessened by the fact that the men who do the work are employed and furnished by another. Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew. *Flores* v. *The Scotia*, 35 Fed. 916; *The Gilbert Knapp*, 37 Fed.

[12] In Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, the stevedoring company was held liable to its employee for negligence in failing to furnish a safe place to work. This consisted in its failure to secure properly a beam which supported hatch covers removed by it in the loading process. The libelant joined the shipowner with the stevedoring contractor, both being represented by the same proctors and advocates. The stevedoring company acquitted the shipowner and the libel was dismissed as to it. The case, in view of these circumstances, is not authority for the view that the stevedoring company is liable to the stevedore under the employer's obligation to furnish a safe working place, for the hazards secured against by the shipowner's obligation of seaworthiness. It holds only that the stevedoring company is liable for its own negligence.

It has frequently been said that a shipowner owes to stevedores the duty of providing a safe place to work, see, e. g., The Joseph B. Thomas, 86 Fed. 658, 660; The No. 34, 25 F. 2d 602, 604; but cf. Willis v. Lyke Bros. S. S. Co., 23 F. 2d 484, 489, although the duty has at times been qualified by statements that it does not extend to latent defects that "a reasonable inspection by the shipowner or his agents would not disclose." Wholey v. British & Foreign S. S. Co., 158 Fed. 379, 380, affirmed, 171 Fed. 399.

209, 210; *The Seguranca*, 58 Fed. 908, 909. That the owner seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection.

Every consideration, therefore, giving rise to the liability and shaping its character bespeaks inclusion of men intermediately employed to do this work, save only that which is relevant to consent as a basis for responsibility. We do not think this is the ultimate basis of the liability where the seaman hired by the vessel does the work. It is only the source of the relation which furnishes the occasion for the liability, attached by law to performance of the service, to come into play. Not the owner's consent to liability, but his consent to performance of the service defines its boundary. That this is given by contract with the worker's employer rather than with the worker himself does not defeat the responsibility.

Accordingly we think the Court of Appeals correctly held that the liability arises as an incident, not merely of the seaman's contract, but of performing the ship's service with the owner's consent. For this view, in addition to the stated considerations of principle, the court rightly found support in the trend and policy of this Court's decisions, especially in *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, and *Uravic* v. *Jarka Co.*, 282 U. S. 234.

The *Haverty* case is of special importance. The Court of Appeals said, with reference to its bearing and that of the *Imbrovek* decision: "And so an injury to a stevedore comes within the classification of a marine tort. 'Atlantic Transport Co. v. Imbrovek, 234 U. S. 52. It seems therefore that when a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor should not determine the measure of his rights. This is the very basis on which the Jones Act[18] was held applicable to give redress to an injured employee in International Stevedoring Company v. Haverty. . . ." 14 F. 2d 98, 101.

The conclusions are sound, notwithstanding the cases are distinguishable in their specific rulings. From that fact it does not follow that either those rulings or the grounds upon which they went are irrelevant or without force for our problem. It is true

[18] Merchant Marine Act of 1920, 41 Stat. 1007, 46 U. S. C. § 688, extending to "seamen" the benefits of the Federal Employers Liability Act, 45 U. S. C. § 51 *et seq.*

that negligence was the basis of recovery in both cases and that in each the stevedoring contractor was held responsible. But it was of the gist of the jurisdictional question presented by the libel in *Imbrovek*[14] that stevedores injured while working aboard the ship, though not employed by its owner, are within the traditional protections afforded to seamen by admiralty and that "the fortuitous circumstance" of their employment by one other than the owner to do the ship's work not only did not remove them from those protections, but brought their employers within the protection of the liability to supply them.[15]

The same underlying considerations were controlling in the *Haverty* decision, although the liability asserted arose under an Act of Congress and the Court cast its ruling in terms of legislative intent. The only fulcrum for its action was the statute's undefined use of the term "seamen" in conferring the right of recovery under the Federal Employer's Liability Act for the employer's negligence. 41 Stat. 988, 1007. Recognizing that for most purposes "stevedores are not 'seamen,'"[16] and relying upon *Imbrovek*, the Court again stressed that "the work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew," and that the statute's policy was to afford compensation for injuries "as properly part of the cost of

[14] It was argued that the wrong, although taking place aboard ship in navigable waters, was not of maritime character and hence not within the admiralty jurisdiction of the District Court.

[15] In answer to the contention that the service was not maritime and hence the independently employed stevedore's claim was not within the admiralty jurisdiction, the Court said: "Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class as clearly identified with maritime affairs as are the mariners'." 234 U. S. 52, 61-62.

[16] The Court of Appeals in this case likewise carefully limited its ruling in recognition of the fact that stevedores are not entitled to all the protections a seaman may claim.

It is in relation to liability for personal injury or death arising in the course of his employment aboard the ship that the policy of our law has been most favorable to the stevedore's claims. Whether or not that policy has been influenced by the vicissitudes experienced in finding protection for him as a result of the *Jensen* decision, 244 U. S. 205; Davis *v.* Department of Labor, 317 U. S. 249, 252-253, the reasons underlying the policy are perhaps more nearly identical in this application, as between seamen and longshoremen, than those supporting other rights of the seaman, such as that to maintenance and cure.

the business," that is, of the maritime service rendered, rather than by the capricious circumstance of employment "by a stevedore rather than by the ship." And the *Uravic* decision rejected an equally capricious discrimination based upon the nationality of the vessel's flag.

Running through all of these cases, therefore, to sustain the stevedore's recovery is a common core of policy, which has been controlling, although the specific issue has varied from a question of admiralty jurisdiction to one of coverage under statutory liability within the admiralty field. It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner.[17] For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards. Moreover, to make the policy effective, his employer is brought within the liability which is peculiar to the employment relation to the extent that and because he also undertakes the service of the ship.

It would be anomalous if such a policy, effective to control such issues, were less effective when the question is simply whether the stevedore is entitled to the traditional securities afforded by the law of the sea to men who do the ship's work. Nor does it follow from the fact that the stevedore gains protections against his employer appropriate to the employment relation as such, that he loses or never acquires against the shipowner the protections, not peculiar to that relation, which the law imposes as incidental to the performance of that service. Among these is the obligation of seaworthiness. It is peculiarly and exclusively the obligation of the owner. It is one he cannot delegate.[18] By the same token it is one he cannot contract away as to any workman within the scope of its policy. As we have said, he is at liberty to conduct his business by securing the advantages of specialization in labor and skill brought about by modern divisions of labor. He is not at liberty by doing this to discard his traditional responsibilities. That the law permits him to substitute

[17] In this case we are not concerned with the question whether the same policy extends to injuries incurred ashore by a stevedore engaged in the same work, a matter which is relevant however in Swanson v. Marra Brothers, Inc., No. 405, decided this day. Cf. O'Donnell v. Great Lakes Co., 318 U. S. 36.

[18] See note 11.

others for responsibilities peculiar to the employment relation does not mean that he can thus escape the duty it imposes of more general scope. To allow this would be, in substantial effect, to convert the ancient liability for maritime tort into a purely contractual responsibility. This we are not free to do.

It remains to consider one other argument, namely, that the *Haverty* decision has been overruled, in effect, by the enactment of the Longshoremen and Harbor Workers Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. § 901 ff, and therefore the effect of that decision as furnishing any support for including longshoremen within the owner's obligation of seaworthiness has been nullified. The argument is that by giving longshoremen the rights of compensation afforded by that Act against the employer and making them exclusive Congress has withdrawn from them not only the protections gained by virtue of the Merchant Marine Act of 1920 under the *Haverty* decision, but also all other protections relating to personal injury which otherwise might be available to them under the general maritime law. In other words, it is claimed that the remedies afforded by the Longshoremen's legislation are exclusive of all other remedies for injuries incurred aboard ship, whether against the employer or others.

This view cannot be accepted. Apart from the fact that the *Uravic* decision was rendered by a unanimous Court some three years after the Longshoremen and Harbor Workers Act was adopted, with a like result in *Jamison* v. *Encarnacion*, 281 U. S. 635,[19] the compelling answer is that Congress by that Act not only did not purport to make the stevedore's remedy for compensation against his employer exclusive of remedies against others. It expressly reserved to the stevedore a right of election to proceed against third persons responsible for his injury[20] and, in case of his election to receive compensation, it provided for assignment of his rights against third persons to his employer.

[19] Both cases were determined on facts which arose prior to enactment of the statute.

[20] Section 33(a) of the Act provides: "If, on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person." 44 Stat. 1440, 33 U. S. C. § 933(a).

binding the latter to remit to him any excess of the recovery over the compensation, expenses of recovery, etc.[21]

We may take it therefore that Congress intended the remedy of compensation to be exclusive as against the employer. See *Swanson* v. *Marra Brothers, Inc.*, No. 405, decided this day; 33 U. S. C. § 905. But we cannot assume, in face of the Act's explicit provisions, that it intended this remedy to nullify or affect others against third persons. Exactly the opposite is true. The legislation therefore did not nullify any right of the longshoreman against the owner of the ship, except possibly in the instance, presumably rare, where he may be hired by the owner. The statute had no purpose or effect to alter the stevedore's rights as against any but his employer alone. Beyond that consequence, moreover, we think it had none to alter either the basic policy or the rationalization of the *Haverty* decision. Because the recovery under the Merchant Marine Act of 1920 was limited to the employer, the necessary effect of the Longshoremen and Harbor Workers Act, likewise limited, was to substitute its remedy for that provided under the preexisting legislation and the *Haverty* decision's construction of it. There was none to nullify the basic and generally applicable policy of that decision or to affect the validity of its foundations in other applications.

It may be added that, beyond the applicability of these considerations to sustain the stevedore's right of recovery for breach of the owner's obligation of seaworthiness, are others to subserve the statutory policy of giving his employer recovery over against the owner when the latter's breach of duty casts upon the employer the burden of paying compensation. These may furnish additional reason for our conclusion. With them however, we are not immediately concerned.

The judgment is

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[21] See 33 U. S. C. §§ 933(b) to (g) inclusive. As to the right of election and the right to receive compensation or the amount of the recovery against third persons, whichever is greater, see Chapman *v.* Hooge, 296 U. S. 526, 529; Marlin *v.* Cardillo, 95 F. 2d 112; Grasso *v.* Lorentzen, 149 F. 2d 127; The Pacific Line, 31 F. 2d 152; Cupo *v.* Isthmian S. S. Co., 56 F. Supp. 45. The statute did not cover members of a crew of a vessel, thereby saving to them their preexisting rights under the Merchant Marine Act of 1920. 33 U. S. C. § 902(3). See South Chicago Coal & Dock Co. *v.* Bassett, 309 U. S. 251, 256-257.

SUPREME COURT OF THE UNITED STATES.

No. 365.—October Term, 1945.

Seas Shipping Company, Inc., Petitioner, vs. Joseph Sieracki.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[April 22, 1946.]

Mr. Chief Justice Stone, dissenting.

Mr. Justice Frankfurter, Mr. Justice Burton and I think the judgment should be reversed.

Respondent, the employee of a stevedoring company, which had contracted with petitioner to load its vessel lying in navigable waters, was injured while so employed, in consequence of the failure of a shackle, a part of the ship's tackle, due to its hidden defects. The courts below have found that two other defendants were liable for negligence in furnishing the defective shackle. The courts were unable to find that the injury was attributable to any negligent act or omission of the vessel or its owner. But the Court of Appeals below and this Court have sustained a recovery against petitioner on the novel ground that the owner is an insurer against injury caused by the unseaworthiness of the vessel or its appliances to a maritime worker on board, although not a member of the crew or the ship's company, and not employed by the vessel.

The Court has thus created a new right in maritime workers not members of the crew of a vessel, which has not hitherto been recognized by the maritime law or by any statute. For this I can find no warrant in history or precedent, nor any support in policy or in practical needs. The liability of a vessel or its owner to members of the crew, as an insurer of seaworthiness of the vessel and its tackle, was not recognized by the maritime law of England until established by statute. Merchant Shipping Act, 39 & 40 Vict. c. 80, § 5; 57 & 58 Vict. c. 60, § 458. In this country the right of the seaman to demand, in addition to maintenance and cure, indemnity for injuries resulting from unseaworthiness, was first recognized by this Court in *The Osceola*, 189 U. S. 158. In later cases it has been established that due diligence of the owner does not relieve him from this obligation. See *The Arizona* v. *Anelich*, 298 U. S. 110, 121; *Socony-Vacuum*

Co. v. *Smith*, 305 U. S. 424, 429, 432; *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96, 100, and cases cited; *The Neptuno*, 30 Fed. 925; *The Frank & Willie*, 45 Fed. 494; *The Julia Fowler*, 49 Fed. 277; cf. *The Edwin Morrison*, 153 U. S. 199, 210.

The liability of the vessel or owner for maintenance and cure, regardless of their negligence, was established long before our modern conception of contract. But it, like the liability to indemnify the seaman for injuries resulting from unseaworthiness, has been universally recognized as an obligation growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected. They are exposed to the perils of the sea and all the risks of unseaworthiness, with little opportunity to avoid those dangers or to discover and protect themselves from them or to prove who is responsible for the unseaworthiness causing the injury.

For these reasons the seaman has been given a special status in the maritime law as the ward of the admiralty, entitled to special protection of the law not extended to land employees. *Robertson* v. *Baldwin*, 165 U. S. 275, 282-3; *The Arizona* v. *Anelich*, *supra*, 122, 123; *Calmar S.S. Corp.* v. *Taylor*, 303 U. S. 525; *Socony-Vacuum Co.* v. *Smith*, *supra*, 430; *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724. See also Judge Addison Brown in *The City of Alexandria*, 17 Fed. 390, 394, *et seq.* Justice Story said in *Reed* v. *Canfield*, 1 Sumn. 195, 199: "Seamen are in some sort co-adventurers upon the voyage; and lose their wages upon casualties, which do not affect artisans at home. They share the fate of the ship in cases of shipwreck and capture. They are liable to different rules of discipline and sufferings from landsmen. The policy of the maritime law, for great, and wise, and benevolent purposes, has built up peculiar rights, privileges, duties, and liabilities, in the sea-service, which do not belong to home pursuits."

It is for these reasons that throughout the long history of the maritime law the right to maintenance and cure, and later the right to indemnity for injuries attributable to unseaworthiness, have been confined to seamen. Longshoremen and harbor workers are in a class very different from seamen, and one not calling for the creation of extraordinary obligations of the vessel or its owner in their favor, more than other classes of essentially land workers

Unlike members of the crew of a vessel they do not go to sea; they are not subject to the rigid discipline of the sea; they are not prevented by law or ship's discipline from leaving the vessel on which they may be employed; they have the same recourse as land workers to avoid the hazards to which they are exposed, to ascertain the cause of their injury and to prove it in court.

Congress has recognized this difference in their status from that of seamen. Although it has given extensive consideration to it in enacting the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 ff., in 1927, and again, upon its revision in 1934 and 1938, in no instance did Congress extend to longshoremen and harbor workers any of the special rights or privileges conferred on seamen by the maritime law. In fact Congress, by the Longshoremen's Act, cut off from longshoremen and harbor workers, the right extended to them by judicial construction of the Jones Act, 46 U. S. C. § 688, *International Stevedore Co.* v. *Haverty*, 272 U. S. 50; *Cravic* v. *Jarka Co.*, 282 U. S. 234, to enjoy the same right of recovery from the vessel or owner as seamen for negligent injuries sustained while working on navigable waters. *Swanson* v. *Marra Brothers, Inc.*, No. 405, decided this day. While the Act gave to longshoremen and stevedores a right to compensation against their employer, it neither conferred upon nor withheld from them any rights of recovery for such injuries against third persons. It can hardly be said that the failure of Congress thus to enlarge the rights of longshoremen, so as to make them comparable to those of seamen, is a recognition of existing rights against third persons arising from the warranty of seaworthiness which no court has ever recognized* and which grows out of a status which longshoremen have never occupied.

There are no considerations of policy or practical need which should lead us, by judicial fiat, to do that which Congress, after a full study of the subject, has failed to do. Wherever the injury occurs on navigable waters, Congress has given to longshoremen and harbor workers substantial rights to compensation against

*The two cases relied upon by the Circuit Court of Appeals do not lend support to its decision. In Cassil v. United States Emergency Fleet Corp., 289 Fed. 774, recovery was sought on the ground that the vessel was negligent, and the Court merely said that there could be no claim against the vessel unless it was unseaworthy. The court seems to have assumed that a recovery for unseaworthiness could be had only if negligence was shown. See cases cited in Mahnich v. Southern S. S. Co., 321 U. S. 96, 100. In W. J. McCahan v. Stoffel, 41 F. 2d 651, a longshoreman was allowed recovery on the ground of negligence of one of the ship's employees.

their employer for injuries inflicted without his fault. *South Chicago Co.* v. *Bassett*, 309 U. S. 251. It has left them free to pursue their remedy for injuries resulting from negligence of third parties, including in this case the vessel and the furnishers of the defective shackle. Where the injury occurs on land they are free to pursue the remedy afforded by local law. *State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263; *Smith & Son* v. *Taylor*, 276 U. S. 179; *Swanson* v. *Marra Brothers, Inc.*, No. 405, decided this day. There would seem to be no occasion for us to be more generous than Congress has been by presenting to them paid up accident insurance policies at the expense of a vessel by which they have not been employed, and which has not failed in any duty of due care toward them. Apparently under the decision now rendered the maritime worker employed by a vessel on navigable waters, but not a member of the crew, would enjoy rights of recovery not accorded to members of the crew. For he would be entitled to indemnity upon the warranty of unseaworthiness as are members of the crew and also to the benefits of the Longshoremen's & Harbor Workers' Act from which members of the crew are excluded. See *South Chicago Co.* v. *Bassett*, *supra*, 255 6.

Nor is the rule now announced to be justified as a modern and preferred mode of distributing losses inflicted without fault. Congress, in adopting the Longshoremen's Act, has chosen the mode of distribution in the case of longshoremen and harbor workers. By 33 U. S. C. § 901 *et seq.* it has given to them compensation for their injuries, irrespective of fault. Section 933 provides that if a stevedore entitled to compensation elects to recover damages against a third person, the employer must pay as compensation a sum equal to the excess of the amount which the commission determines is payable on account of the injury over the amount recovered against the third person. The whole philosophy of liability without fault is that losses which are incidental to socially desirable conduct should be placed on those best able to bear them. Congress has made a determination that the employer is best able to bear the loss which, in this instance, could not be avoided by the exercise of due care. This is an implied determination which should preclude us from saying that the ship owner is in a more favorable position to absorb the loss or to pass it on to society at large, than the employer.